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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT.

BY
C. A. PROUTY.

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JUDGES
OF THE
SUPREME COURT,
DURING THE TIME OF THESE REPORTS.

HON. JONATHAN ROSS, CHIEF JUDGE.

HON. RUSSELL S. TAFT,	}	ASSISTANT JUDGES.
HON. JOHN W. ROWELL,		
HON. JAMES M. TYLER,		
HON. LOVELAND MUNSON,		
HON. HENRY R. START,		
HON. LAFOREST H. THOMPSON,		

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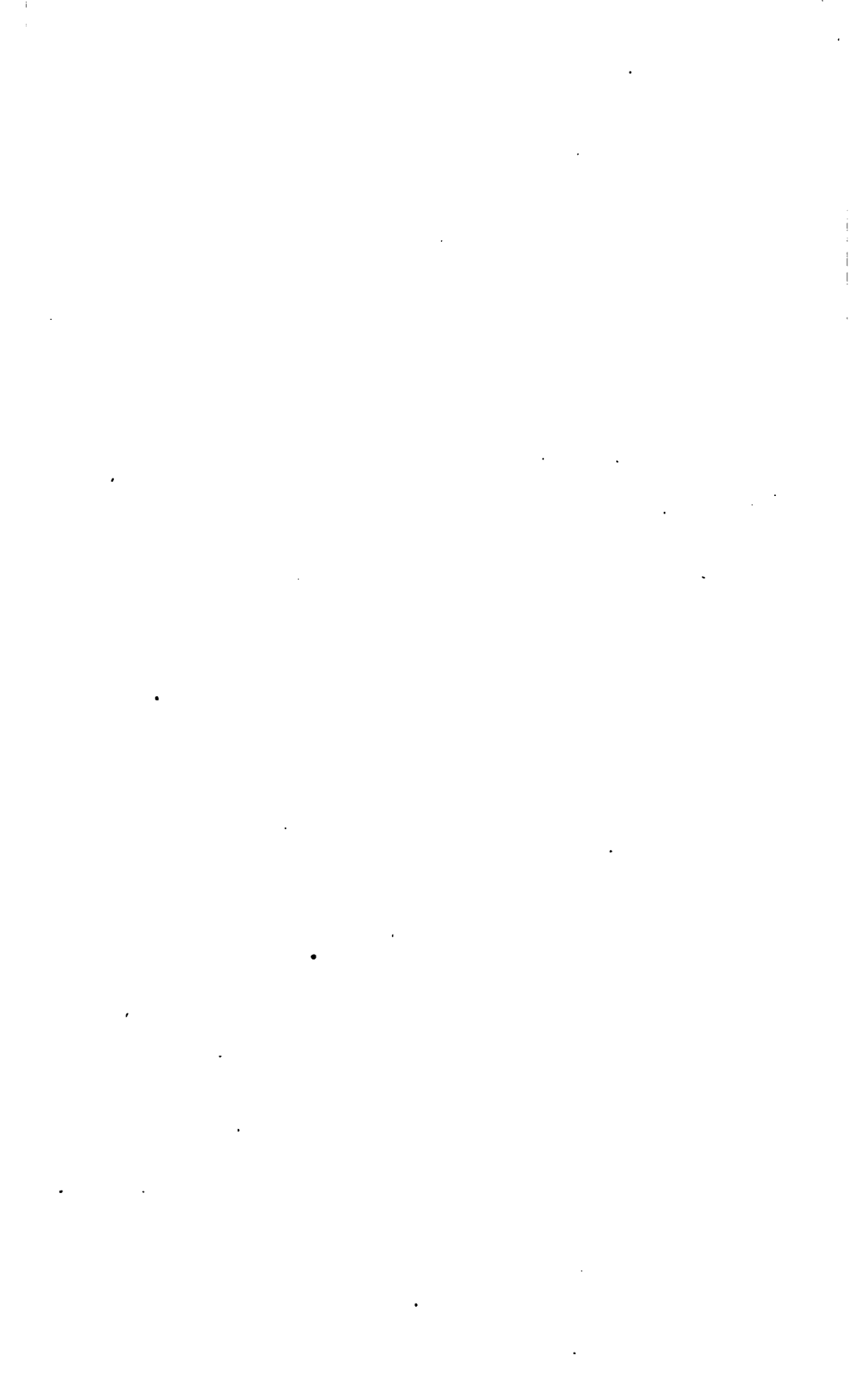
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT.

WHITE AND HAMMOND, EXECUTORS,

v.

ROLLIN AMSDEN.

OCTOBER TERM, 1893.

Water power. Construction of grant. The condition of things, situation of parties and subsequent acts may be considered.

1. In construing a contract the object aimed at is to discover and give effect to the intention of the parties; and if the words are equivocal, resort may be had to the circumstances under which it was executed and the contemporaneous construction put upon it by the parties, as evidenced by possession or similar acts.
2. In 1833 the Mill Dam Company acquired title to three water privileges, known as the lower power, the middle

power and the great dam power. At the great dam power was a large dam, used for the double purpose of furnishing a head at that point, and of storing water for the two powers below. In 1835 the company enacted by-laws relative to the sale and future government of the several water privileges, and from that time on the water was used by the various privileges in substantially the manner specified in the by-laws. October 30, 1841, the Mill Dam Company conveyed to Wardner the lower power, with all the water and other privileges appurtenant thereto, and to Hubbard the middle power, with all the privileges and appurtenances belonging to it, both conveyances being made subject to the by-laws of the corporation. On the same day the Mill Dam Company executed two mortgages upon the remaining property of the corporation situate at the great dam, excepting therefrom "the land covered by the great dam and by the water when the pond is full." The legal title to the property covered by said two mortgages passed by decree of foreclosure to one Lamson, who also became the owner, in 1864, of the middle power and all of the lower power except the grist mill, and who conveyed his interest, in 1865, to the Windsor Manufacturing Company. October, of the same year, that company executed to the Windsor Savings Bank two mortgages, one for ten thousand dollars upon the property at the upper dam, and the other for twenty thousand dollars upon the property at the middle power. Both these mortgages were foreclosed and under the decrees the defendant obtained title to the great dam property, in 1884, and the testator of the orators to middle power property at about the same time. The property at the middle power consisted of valuable structures intended to utilize the water power derived from the great dam. In 1885 the defendant made certain repairs upon the great dam, and claimed and collected of the owners of the middle power and the lower power that proportion of the expense of such repairs provided for by the by-laws. The description in the mortgage, under which the defendant claims, is by reference to former deeds, adding the words, "together with the various shops, mills, dwelling houses, and other buildings thereon standing, and the steam engine, boiler and appurtenances thereto belonging and the main shafting in said buildings, and all the water power."

Held, that under this description, in view of the relative value of the different properties, the circumstances under which and purposes for which they had been erected, the manner in which the water power had previously been and

was then being utilized, and the practical construction put upon his rights by the defendant, later, in 1885, the defendant took, not the entire water power at the great dam, but only those rights therein to which the property there situate was entitled under the by-laws of the Mill Dam Company.

3. The merger of the different titles in a common owner between the mortgage of 1841 and those of 1865 did not, as matter of law, abrogate the by-laws under which the different privileges had been used.
4. A party who would insist upon prescriptive rights, acquired by adverse possession, in answer to the rights claimed by the orator in a suit in equity, must set up such prescription in his answer.
5. The defendant was under no personal duty, by reason of his title to said great dam property, to open and shut the gates in the great dam in accordance with the by-laws of the Mill Dam Company.

Bill in chancery. Heard at the December term, 1892, Windsor county, upon the pleadings and the report of a special master. TYLER, chancellor, dismissed the bill *pro forma*. The orators appeal.

This suit was brought to establish the rights of the orators in certain water privileges in the village of Windsor. The Ascutney Mill Dam Company, which was organized in 1833, acquired, soon after its organization, three water powers which were known respectively as the lower power, the middle power and the great dam power. At the great dam power an expensive dam some forty feet in height was erected for the double purpose of forming an extensive reservoir and thereby ponding back the water for the benefit of all three powers, and of affording a head for the mills situate at the great dam itself. Soon after its organization the Ascutney Mill Dam Company enacted certain by-laws for the regulation of the use of the water by these different privileges. Article three of these by-laws was as follows:

“Article 3. The opening and shutting of the gates at the great dam, except when there is surplusage of water, shall be regulated as follows:

During the month of					
	opened at	7	o'clock A. M.,	shut at	9 o'clock P. M.
January,	"	6½	"	"	8½
February,	"	6	"	"	8
March,	"	5	"	"	7
April,	"	5	"	"	7
May,	"	5	"	"	7
June,	"	5	"	"	7
July,	"	5	"	"	7
August,	"	5	"	"	7
September,	"	5	"	"	7
October,	"	6½	"	"	8½
November,	"	7	"	"	9
December,	"	7	"	"	9

"Provided, nevertheless, that by consent of a majority of the parties in interest, estimated by the proportionate value of all the privileges, the said gates may be opened half an hour earlier or closed half an hour later in any month; and in either case said gates shall be closed half an hour at twelve o'clock M. each day. And the water, when taken from said dam, in all cases except when it runs over the coping, shall be drawn from the upper flumes now constructed; and the privilege or privileges when occupied on either side of the brook immediately connected with said dam and taking water from said flumes, shall be forever charged with the duty of opening and shutting the gates of said flumes, in conformity to the foregoing regulations.

"And the amount of water so drawn from the reservoir through said flumes shall not exceed fifty cubic feet per second at any time, and when the water has fallen to three feet below the top of the coping thirty cubic feet per second can be drawn."

The orators' testate held title to the middle privilege and the defendant held the title to the great dam privilege. The defendant claimed that under his title he was the absolute owner of the water power situated at the great dam, and that he could control the opening and closing of the gates in that dam as he saw fit, without reference to the rights of the other privileges, except the right of the grist mill situate upon the lower privilege. The orators claimed that their privilege had the same right to the use of the water now which it had originally possessed under the by-laws of the

Ascutney Mill Dam Company. The prayer of the bill was that the defendant be compelled to open and close the gates in the great dam in accordance with these by-laws, or, if the court was of the opinion that no personal liability rested upon the defendant to so open and close said gates, that he be enjoined from interfering with the orators in opening and closing them in such a manner as to obtain that flow of water to which they were entitled.

The facts considered by the court fully appear in the opinion.

William Batchelder and J. J. Wilson for the orators.

The grant of the middle power, with the buildings upon it and appurtenances belonging to it, necessarily carried the right to use the water power, for the purpose of utilizing which the buildings were constructed, and which had always been used in connection with them; and the grant of the property at the great dam, under which the defendants claimed, carried with it only so much of the water power as was properly appurtenant to that property. Upon a severance of the heritage a grant will be implied of those continuous and apparent easements which have been used by the owner during the unity. *Harwood v. Benton et al.*, 32 Vt. 724; *Perrin v. Garfield*, 37 Vt. 304.

The defendant cannot now raise the claim of adverse possession, since it has not been raised by the pleadings. *Warren v. Warren*, 30 Vt. 530.

W. B. C. Stickney, Gilbert A. Davis and Frank H. Clark for the defendant.

The defendant is under no personal liability in respect of the opening and shutting of the gates, even upon the contention of the orators. *Barton v. Larned*, 11 Vt. 135; *Westminster v. Willard*, 65 Vt. 266.

At the time of the execution of the two mortgages, under which the orators and defendant respectively claim, the Windsor Manufacturing Company was the owner of the entire property, and could convey by each mortgage such portion of it, with such privileges, as it saw fit. The effect of the unity of title in that company was to merge in it all the rights and easements. Washburn, Ease., ss. 516, 522; *Wilder v. Wheldon*, 56 Vt. 344; *Plympton v. Converse*, 42 Vt. 712, 717; *Hapgood v. Brown*, 102 Mass. 451; Wait's Act. and Def., 735.

Severance of the two estates would not necessarily revive the easement which had been formerly attached to either estate; it would be entirely a question of what the grantor actually did by its conveyances, and in determining that there is an important distinction between a natural easement and an artificial easement. In this case there was no natural, visible easement with reference to which the parties must be assumed to have contracted. The language of the defendant's grant, of "all the water power," is plain and unambiguous and should control. *Hazard v. Robinson*, 3 Mason 273; *Perry v. Parker*, 1 Woodbury and Minot 280; *Miller v. Lapham*, 44 Vt. 416; *Grant v. Chase*, 17 Mass. 443; *Albee v. Huntley*, 56 Vt. 354; Gould, Waters, ss. 313, 360; *Brace v. Yale*, 4 Allen 393; Washb., Ease., 53; Washb., R. P., 66, n. 4; Angell, Watercourses, ss. 145-147, 191.

TAFT, J. The Ascutney Mill Dam Company was chartered in 1833. After organization it acquired title to certain property, including that in question, which consisted of a large stone dam with three water privileges; one at said dam known as the upper or great dam power, and two below with dams sixteen or seventeen feet high, known as the middle and lower powers. The great dam was forty to forty-two feet high, and was built and intended for a two-

fold purpose, viz., to create a power to be used in connection with the privileges at said dam, and to store a surplus of water for the use of such privileges below the great dam as might be sold by the corporation.

The Mill Dam Company owned the land covered and flowed by the reservoir created by the great dam, and the land surrounding the reservoir. In December, 1835, the company enacted by-laws relative to the sale and future government of the water privileges that belonged to the corporation. Unless there was a surplus of water the opening and closing of the gates in the great dam for the purpose of furnishing the two lower powers with water was provided for and regulated by article three of the by-laws. On the 30th day of October, 1841, the Mill Dam Company sold and conveyed to Allen Wardner its lands at the lower power and all the water and other privileges and appurtenances thereto belonging, and to one Hubbard the lands of the company at the middle power, with all the privileges of, and appurtenances to, the same. Both conveyances were made subject to the by-laws of the corporation, but the amount of water which the grantees were entitled to draw in cubic feet per second was not set forth in the deeds of sale. On the same day, October 30, 1841, the Mill Dam Company executed two mortgages upon the remaining property of the corporation, all situate at the great dam, excepting therefrom "the land covered by the great dam and by the water when the pond is full," and reserving the right to flow contiguous lands by means of flash-boards, and of entering to repair or rebuild the dam. This conveyance covered all the privileges belonging to the corporation at the great dam, and was made subject to the by-laws of the corporation. The legal title to the property covered by said mortgages passed from the corporation by force of decrees of foreclosure, based upon said mortgages, and is now in the defendant. Thus the ownership of all the powers is derived from conveyances

executed upon the same day, October 30, 1841, and all made subject to the by-laws of the corporation, which regulated the taking of water from the great dam. Under such conveyances and the by-laws the lower powers took the right to draw water from the great dam, and the conveyance of the upper power was, under the by-laws, subject to such rights. These rights appear in the conveyances of the upper power from the fact that they were made subject to the by-laws. A party claiming title through a chain of regularly executed conveyances is bound by all that appears in such conveyances as an incumbrance upon such title. By force of this rule the defendant is bound by the recitals in the former deeds in his chain of title, that the conveyances were made subject to the by-laws of the corporation, unless he is absolved therefrom by reason of subsequently acquired rights.

The legal title to the property covered by the two mortgages executed October 30, 1841, and which is now in the defendant, passed by conveyances to E. G. Lamson, and in the latter part of the year 1864 he was the owner of the great dam power, the middle power and all of the lower power property except the grist mill. In 1864 he improved the property at the upper power by erecting a new saw mill, a drop shop and a cutlery shop.

These changes were made to utilize the water at that point instead of discharging it into the stream unused. In March, 1865, Mr. Lamson conveyed all the property then owned by him at the three powers to the Windsor Manufacturing Company, and on the 21st day of the following October that company, owning the upper and middle privileges and a portion of the lower privilege, executed to the Windsor Savings Bank two mortgages, one for ten thousand dollars upon the property at the upper dam, the other for twenty thousand dollars covering the property at the middle power.

The mortgages were executed, delivered and recorded contemporaneously and decrees of foreclosure were obtained by the bank upon both mortgages; the properties were not redeemed from either and the decree under the mortgage of the upper power was assigned to the defendant in August, 1884, and expired in December following, and his title is derived thereunder. The decree under the mortgage of the middle power expired and the property was sold to the orators' testate. The defendant claims an absolute right to all the water in the stream at the upper power; that the by-laws of the corporation have been abandoned, and the rights of the parties to this proceeding are not in any respect governed by them, except he recognizes the right of the grist mill at the lower power, as provided in the conveyance to Allen Wardner.

The title of the Windsor Manufacturing Company was derived under the two mortgages executed as above stated, in October, 1841, and each mortgage was made subject to the by-laws of the corporation, and in all of the deeds of the property that have been given since, the property is described by reference to prior deeds. The main question in controversy between the parties in this cause arises under the mortgage of the great dam power by the Windsor Manufacturing Company to the Windsor Savings Bank.

It is under this mortgage that the defendant claims title. In it the premises are described by reference to the deed to the Manufacturing Company, and there is added to the description the following words:

"Together with the various shops, mills, dwelling houses or other buildings thereon standing, and the steam engine, boiler, and the appurtenances thereto belonging, and the main shafting in said buildings and all the water power; meaning to convey hereby all of said premises so conveyed" (with an exception immaterial here).

Under the assignment of the decree under said mortgage

"The defendant claims to be the owner of the great dam

and pond and all the water power, except the grist mill right, as against any adverse rights thereto or interest therein of the owners or lawful occupants of said middle falls and lower falls property and water privileges thereunto belonging."

The defendant claims that under the words "all the water power," he has a right to all the water power created by the reservoir.

There is nothing in the description of the premises in the respective conveyances in the defendant's chain of title that can be construed as covering the land under the great dam or under the water in the pond; therefore the defendant has no right to the same by virtue of any title derived under the assignment to him of the said decrees. The main question presented is, to what water power is the defendant entitled under the description in the mortgage deed of the upper power to the Windsor Savings Bank.

This is a question of law arising upon a construction of the deed. In construing a contract the object aimed at is to discover and give effect to the intention of the parties.

It is said in *Gray v. Clark*, 11 Vt., 583, "the great object, and indeed the only foundation of all rules of construction of contracts, is to come at the intention of the parties." If the words or terms of a contract are equivocal, resort may always be had to the circumstances under which the contract was executed, and to the contemporaneous construction given to the contract by the parties, as evidenced by possession or similar acts.

The subsequent acts of the parties have always been admitted to show how the parties understood their contract and as a practical construction of it. *Gray v. Clark*, 11 Vt. 583; *Thompson v. Prouty*, 27 Vt. 14; *Barker v. Railroad Co.*, Ibid 766; *Vt. & C. R. Co. v. Vt. C. R. Co.*, 34 Vt. 1. It is only when the terms of the contract are ambiguous that this rule of construction is resorted to, and then the intention of the parties must be determined from the words of the

contract, but a reference to the situation of the parties and the subject matter, under the circumstances, is always proper.

In the mortgage under which the defendant claims, there is no reference, in the description, in express terms, to that portion of the water power created for the purpose of being stored and used by the parties owning the middle and lower privileges. The description is by reference to former deeds and adding thereto "together with the various shops, mills, dwelling houses and other buildings thereon standing and the steam engine, boiler and appurtenances thereto belonging, and the main shafting in said buildings, and all the water power, meaning to convey, etc." We think this description covers the water power which belongs and is appurtenant to the other property conveyed and not all the water power created by the great dam.

There is no description of the great dam, nor the water power created by it, and no reference to it, and when we take into consideration the circumstances connected with the great dam and the middle power, we think it is apparent that the parties intended to convey only the water power connected with the buildings at the upper dam, without infringing upon any of the rights which the middle and lower powers had under the by-laws of the corporation to which all of the conveyances theretofore were subject.

At the time of the execution of the mortgage under which the defendant claims, the buildings erected at the middle power were of great value. The property at one time was mortgaged for twenty-five thousand dollars, and at another for thirty-five thousand dollars; one building was erected which, with the engine house and chimney cost thirty thousand dollars, and there was also erected a brick forge shop, brass foundry, car shop, blacksmith shop, machine shop, engine house and chimney, and a large boarding house, and the upper power was then utilized as hereinbefore stated.

The master finds that the right to draw water from the great dam was a large element in the value of the lower privileges and the property connected therewith. Such was the situation at the middle and upper powers when the Manufacturing Company executed the two mortgages; the one upon the upper privilege for ten thousand dollars and upon the middle for twenty thousand dollars.

Considering the phraseology of the mortgage, the character, situation, condition and values of the properties, the then use of the water; and the amount for which each privilege was respectively mortgaged, we are inclined to construe the description in the mortgage under which the defendant claims as covering only the water power used in connection with the buildings at the upper privilege and to which it was entitled under the by-laws by which, until that time, all the parties had been governed. It could not have been the intention of the parties to pass all the water power created by the great dam and reservoir under the mortgage of the upper power and thus incur the risk of destroying, to a great extent, the values of the middle privileges. The defendant took possession of the upper power in December, 1884, and during the following year made repairs upon the great dam, and claimed that the middle and lower powers were chargeable with one half of the amount paid for such repairs upon the basis of the values of the three respective powers which he claimed to be as follows: The upper power five-tenths, the middle power three-tenths, and the lower power two-tenths, and the owners of the middle and lower powers paid the respective amounts in accordance with the defendant's claim. This act of the defendant as late as the year 1885 indicated the practical construction that he put upon the deed under which he claims title, for it was only by force of the by-laws that he could call upon the lower powers to contribute to the repairs of the great dam. Upon the construction of the deed in question the remarks of Ben-

nett, J., in *Thompson v. Prouty*, 27 Vt. 14, are quite apropos. In speaking of whether a contract should have a certain construction, he says :

“I, for one, should have some doubts, * * * * * but the defendant having given a different practical construction to it, we are disposed to adopt his in that particular.”

It is true, the use of the water has been to some extent irregular, but except temporarily it has not been adverse to the rights of others, and did not have the effect, as matter of law, to abrogate the by-laws; neither did the merger of the easements, by the acquisition of the title to all the properties by E. G. Lamson, and the master finds that unless thus abrogated there has been no abandonment of them. No rights have been acquired by the defendant by prescription or adverse use. This is apparent from the facts reported. Even if it were otherwise he could not in this proceeding insist upon such rights, for he does not claim them by the answer. *Warren v. Warren*, 30 Vt. 530. With the construction which we put upon the deed under which the defendant claims, the ownership of the land under the great dam, and under the water in the pond, etc., is immaterial, as is also the ownership of stock in the Ascutney Mill Dam Company. It is therefore unnecessary to consider the various exceptions to the rulings of the master, and to the report, in respect to those questions.

There is no personal liability, on the part of the defendant, to the orators. *Lamson v. Worcester*, 58 Vt. 381.

The orators are entitled to a decree in accordance with the prayer of the bill, excluding any personal liability of the defendant.

Decree reversed and cause remanded with mandate in accordance with the views herein expressed.

EVA P. COOLEIDGE v. CONTINENTAL INS. CO.

JANUARY TERM, 1894.

Exceptions. Reference to stenographic transcript. Policy of insurance. What conditions must be stated in declaration. When rendered void by foreclosure proceedings.

1. If the stenographic transcript is referred to for the purpose of showing what exception was taken to the testimony of a witness, and it appears from such transcript that the question made in supreme court was not raised in the court below, it will not be considered.
2. At law a writing cannot be referred to and made a part of the declaration, and such a reference adds nothing to the other allegations.
3. In declaring upon a contract containing an exception or qualification, the exception or qualification must be set forth, and a failure to do so will constitute a variance.
4. A declaration upon a policy of insurance promising to insure the plaintiff against loss "except as hereinafter provided," must state the excepted instances.
5. So if the policy is to insure personal property contained in a certain building, it is a variance to declare upon a promise to insure the property generally without reference to its location.
6. Also to allege an absolute promise to pay the loss, without stating any time of payment, when by the terms of the policy it was not payable until sixty days after proofs of loss.
7. But the conditions and stipulations in the policy which are distinct and collateral and do not qualify the promise need not be stated.

8. The policy provided that it should be void if foreclosure proceedings were commenced with the knowledge of the assured. *Held*, that the policy would not be rendered void by the pendency of such proceedings at the time of its issue.

Assumpsit upon a policy of fire insurance. Plea, the general issue. Trial by jury at the June term, 1893, Bennington county, THOMPSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff called her husband, F. H. Cooledge, as a witness, and the exceptions stated that "against the objection and exception of the defendant, the court allowed him to testify that he was the agent of his wife, the plaintiff, in the purchasing of goods and carrying on the business at the store insured; that the schedules attached to the proofs of loss were correct as to items, and that said items were correct as to price."

Further on the exceptions stated that "as bearing upon the admissibility of the evidence aforesaid, and as showing the exceptions by defendant as actually taken on trial to the admission of their testimony, the testimony of F. H. Cooledge (and others) is referred to."

The stenographic transcript showed that the testimony of Mr. Cooledge, in the respects mentioned, was objected to, and was received under the exception of the defendant; but further showed that the defendant did not object to the testimony upon the ground that the agency of the husband could not be proved by his own testimony, but did place its objection to said testimony upon other grounds.

In the opening of her case the plaintiff offered in evidence a policy of insurance issued to her by the defendant company. The defendant objected to the admission of this policy for the reason that there was a variance between the contract set forth in it and the contract declared upon in the plaintiff's declaration. This objection was overruled and

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the policy was admitted, subject to the exception of the defendant.

The material part of the plaintiff's declaration was as follows :

"In a plea of the case for that whereas the plaintiff on the second day of January, A. D. 1891, at Arlington, in the county of Bennington aforesaid, was the owner of one two-story frame tin roofed building, occupied for tin shop, office and machine shop, situate in said Arlington, and then was the owner of stoves, tinware, and such other merchandise as is usually kept in a tin shop and hardware store, and of furniture, fixtures, tools and machinery, all then kept and located in said building, situated and standing upon certain land of the plaintiff, and all of the value of more than eighteen hundred dollars.

"That said defendant was then, and ever since has been, and still is, a corporation organized and existing under the laws of the State of New York, and on said twenty-second day of January, A. D. 1891, had a license, in force, issued to it under, and by virtue of, and pursuant to the provisions of the laws of the State of Vermont, authorizing it to insure property against loss by fire, and transact insurance business in said each named state. That on the second day of January, A. D. 1891, said land of the plaintiff, upon which said building was situated, and said building was subject to a mortgage of five hundred dollars, with interest thereon for less than one year which had by the plaintiff, before said second day of January, A. D. 1891, been executed to Ernest E. Andrew, which said mortgage was on said second day of January, A. D. 1891, due and owing to the estate of said Andrew, he having deceased before that date.

"That on said second day of January, A. D. 1891, at Arlington aforesaid, the plaintiff made application to the defendant for insurance against loss by fire upon said building, and all said personal property, for the benefit of the plaintiff, and for the benefit of the said mortgage debt and the holder thereof.

"That thereupon, on said second day of January, A. D. 1891, the defendant made and delivered to the plaintiff its written contract and policy of insurance, and therein and thereby, in consideration of the sum of twenty-six and

twenty-five one-hundredths dollars to it in hand paid, by the plaintiff, did insure the plaintiff for the term of one year from said second day of January, A. D. 1891, at noon, to the second day of January, A. D. 1892, at noon, against all direct loss or damage by fire upon or to said building and said personal property to an amount not exceeding fifteen hundred dollars, subdivided and separated into items in said contract of insurance as follows :

“Upon her two-story frame tin roofed building, occupied for tin shop, office and machine shop, situate in said Arlington, the sum of eight hundred dollars.

“Upon her stock of stoves, tinware, and such other merchandise as is usually kept in a tin shop and hardware store therein, five hundred dollars.

“Upon her furniture, fixtures, tools and machinery therein, two hundred dollars, with loss, if any, payable to mortgagee as interest may appear, and in case of loss or damage thereto by fire within said term therein, and thereby undertake and promise to pay, and indemnify the plaintiff for such loss or damage to an amount not exceeding the said sum for which each item of property was so respectively insured, all which will more fully and at length appear from said original contract and policy of insurance, now ready here in court to be produced; that plaintiff on her part faithfully hath kept, performed and observed each, every, and all of the conditions of said contract, by her to be kept, observed and performed.

“That upon the sixteenth day of June, A. D. 1891, and while said policy was in force, said building then being occupied by the plaintiff, and all said described personal property therein, mentioned and enumerated in said contract of insurance, all then being owned by the plaintiff, said building then being subject to said mortgage, were without the fault of the plaintiff, wholly consumed and destroyed by fire, and thereby wholly lost to the plaintiff at Arlington aforesaid, and to the direct damage and loss of the plaintiff more than fifteen hundred dollars as follows, viz.: Upon said first item of property one thousand fifty dollars, upon said second item five hundred seventeen dollars, and upon said third item three hundred fifty-seven dollars. That immediately after said fire the plaintiff, to wit, on the seventeenth day of June, A. D. 1891, gave notice in writing to

said defendant of such loss, and within sixty days after said fire rendered a written statement to the defendant, stating therein the knowledge and belief of the plaintiff as to the time and origin of said fire; the interest of the insured and all others in the property; the cash value of each item thereof, the amount of loss thereon; stating all encumbrances thereon; that there was no insurance on said property except that of the defendant; containing a description of all the description of said property as described in the said policy of the defendant; stating any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of said policy of defendant; by whom and for what purpose the said building, and the several parts thereof, were occupied at the time of said fire; all signed and sworn to by the plaintiff.

"That more than sixty days have now elapsed since said notice and sworn statement so was furnished to said defendant.

"That thereupon the said defendant wholly neglected and refused to ascertain, or to attempt to ascertain, the amount of said loss and damage to the plaintiff as said policy provided it should do, but alleged, claimed, and pretended to the plaintiff that said contract of insurance was wholly null and void, and of no binding force or effect upon it, and then did, and ever since has, and still does, wholly neglect and refuse to pay to or indemnify the plaintiff for the said loss and damage suffered and sustained by her by reason of the said fire, as in and by said contract of insurance it had promised and agreed to do."

The following was the policy of insurance offered in evidence:

"The Continental Insurance Company, of the City of New York, in consideration of the stipulations herein named and of twenty-six and twenty-five one-hundredths dollars premium does insure Eva P. Cooledge for the term of one year from the second day of January, 1891, at noon, to the second day of January, 1892, at noon, against all direct loss or damage by fire except as hereinafter provided, to an amount not exceeding fifteen hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit:

"\$800 on her two-story frame tin roofed building, occu-

pied for tin shop, office and machine shop, situate in Arlington, Vt.

"\$500 on stock of stoves, tinware, and such other merchandise as is usually kept in a tin shop and hardware store, therein.

"\$200 on furniture, fixtures, tools and machinery therein. Loss, if any, payable to mortgagee, as interest may appear.

"\$1,500. One year, \$26.25.

"To attach to policy No. 1320, Continental Ins. Co., of New York.

"Rutland, Vt., Agency.

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment of estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild; or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

"This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

"This entire policy, unless otherwise provided by agree-

ment indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss: or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

“This company shall not be liable for loss caused directly

or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such buildings or its contents shall immediately cease.

"This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor unless liability is specifically assumed hereon, for loss to awnings, bullion, cast, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools or property held on storage for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

"If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

"In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

"This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal of this policy shall be void.

"This policy shall be canceled at any time at the request of the insured; or by the company, by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall

be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

"If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the

title, use, occupation, location, possession, or exposures of said property since the issuing of this policy ; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire ; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged ; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

“The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same ; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

“In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire ; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire ; and the award in writing of any two shall determine the amount of such loss ; the parties thereto shall pay the appraiser respectively suggested by him, and shall bear equally the expense of the appraisal and umpire.

“This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for ; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company,

including an award by appraisers when appraisers have been required.

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

"If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

"Wherever in this policy the word 'insured' occurs it shall be held to include the legal representation of the insured, and wherever the word 'loss' occurs it shall be deemed equivalent of 'loss or damage.'

"If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

"Provisions required by law to be stated in this policy.' This policy is a stock policy, and issued under and in pursuance of Chapter 189, of the Laws of the State of New York, passed April 16, 1874, and amended by chapter 282, passed May 21, 1878, entitled 'An act to provide security against extraordinary conflagrations, and for the creation of safety funds by fire insurance companies.'

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

J. C. Baker for the defendant.

The contract stated in the plaintiff's declaration is an absolute one. That set forth in the policy of insurance is a conditional one; hence there is a fatal variance between the declaration and the evidence. *Gotlieb v. Leach*, 40 Vt. 278; 1 Chitty, Pl., (16th Am. Ed.) 316; *Hitt v. Campbell*, 6 Me. 109; *Whitaker v. Smith*, 4 Pick. 83; *Lown v. Winters*, 7 Conn. 263; *Jones v. Cooper*, 2 Aik. 54; *Bank v. Downer*, 27 Vt. 182; *Mann v. Burchard*, 40 Vt. 326.

The pendency of the foreclosure proceedings rendered the policy void. *May, Ins.*, (2d Ed.) 250; *McIntire v. Ins. Co.*, 102 Mass. 230.

O. M. Barber for the plaintiff.

It is sufficient if the declaration apprises the defendant of the nature of the action, and enables him by reference to the record of the cause itself to plead the judgment in bar to a second suit for the same cause of action. *Derragon v. Rutland*, 58 Vt. 130.

Courts do not favor objections upon the ground of variance; certainly not where there can have been no misap-

prehension upon the part of the defendant. *Vail v. Strong*, 10 Vt. 460; *Hadley v. Bordo*, 62 Vt. 287; *Ammel v. Noonah*, 50 Vt. 406.

If it is to be held necessary to set forth in a declaration all the manifold conditions in these policies of fire insurance and further aver the performance of those conditions, certainly a long step backward has been taken. *Tripp v. Vt. Life Ins. Co.*, 55 Vt. 100; 1 Chitty, Pl., (5th Am. Ed.) 269; 2 May, Ins., s. 589.

The policy would only be rendered void by foreclosure proceedings which were begun after its issuance. Words in an insurance policy are to be construed most favorably towards the insured. *Brink v. Mechanics' Ins. Co.*, 49 Vt. 457; *Mosely v. Vt. Mut. Ins. Co.*, 55 Vt. 142, and cases therein cited; *Findeisen v. Ins. Co.*, 57 Vt. 520; *Carson v. Jersey City Ins. Co.*, 14 Vroom 300; 1 May, Ins., s. 175.

TAFT, J. I. It is stated in the record that, under objection and exception, the plaintiff's husband testified that he was the agent of his wife. It is insisted this was error; that it was necessary before he could testify, to establish his agency by other testimony than his own, according to the rule stated in *Sanborn v. Cole*, 63 Vt. 590. As showing the exception, the testimony is referred to, and upon an examination of it, it appears that the question was not made upon the trial. Therefore it is not before us.

II. The defendant claims there was a variance in three respects, between the contract offered in proof and that set forth in the declaration, and that the court erred in admitting the contract in evidence. The plaintiff in setting forth her contract alleges the making and delivery of it by the defendant, and that the defendant therein and thereby in consideration of twenty-six and twenty-five one-hundredths dollars to it paid, did insure the plaintiff upon a tin shop building and merchandise therein, for one year, expiring at

noon, January 2, 1892, against all direct loss or damage by fire upon or to the property named, to an amount not exceeding fifteen hundred dollars, describing the property, its subdivisions, and the amount insured on each item, with loss, if any, payable to a mortgagee, and in case of loss or damage by fire thereto did promise to pay such loss or damage, to an amount not exceeding such sum for which each item of property was so respectively insured, and further alleging "all which will more fully and at length appear from said original policy of insurance now ready here in court to be produced; and a performance on her part of all the conditions of the policy, by her to be kept, observed, and performed." The allegation that the facts set forth will more fully and at length appear from the policy ready in court to be produced, etc., adds no force to the declaration for, as was said by the court in *Estes v. Whipple*, 12 Vt. 373, the writing declared upon "cannot be referred to and so made a part of the declaration, as is done in chancery." The questions of variance were raised and passed upon in the county court, and so are properly before us under R. L., s. 1391.

a. The contract is declared upon as absolute and unconditional; it is alleged that by it the defendant did insure the plaintiff against all direct loss or damage by fire upon or to the property, etc. The contract in proof insures "against all direct loss or damage by fire, *except as hereinafter provided*," and there are subsequent stipulations which provide that in certain contingencies the policy shall be void, such as loss caused by riot, etc. By the very terms of the contract it is conditional; it insures the plaintiff only in case the loss does not occur from the excepted causes; a contract to insure, without limitation, is not a contract to insure only in certain cases.

b. In another respect the contract in proof is a conditional or qualified one. The declaration is upon a contract

to insure the tin shop building and its contents. The company would be liable if the property burned, situated as described when the policy was issued, and it might be liable in case of loss if the building was located elsewhere and the personal property contained in some other building. *Pelly v. Governor, etc.*, 1 Bur. 341; *Lyons v. Prov. Wash. Ins. Co.*, 14 R. I. 109. The contract in proof insured the property "while located and contained as described herein, and not elsewhere." This latter clause qualifies the contract, making it conditional.

In the two respects named the contract was a qualified or conditional one. In declaring upon a contract, if it contains an exception or provision qualifying the defendant's liability, the exception or proviso should be stated. An omission to do so creates a variance which is necessarily fatal. Bennett, J., in *Woodstock Bank v. Downer*, 27 Vt. 482, speaking of a clause in an agreement says, "It is a modification of the contract itself, and should have been set out in the declaration." Chitty says in his Pl., p. 314: "The omission of any part of the contract which materially qualifies and alters the legal nature of the promise which is alleged to have been broken will be fatal." In *Vavasour v. Ormrod*, 6 B. & C. 430, Lord Tenderden, C. J., says, "The plaintiff ought in his declaration to have stated the reservation and the exception, and if he state it as an absolute unconditional stipulation without noticing the exception, it will be a variance." While it is true that a question of variance sometimes does not affect the result of a trial, you cannot disregard them without, as Peck, J., in *Gottlieb v. Leach*, 40 Vt. 278, says, "violating the principles of pleading and evidence." *Ammel v. Noonan*, 50 Vt. 406, cited by plaintiff, does not aid her. It was held in that case that it was necessary to set forth in the declaration only the particular promise or part of the agreement for the breach of which suit was brought, and that there was no variance if the

promise alleged in the declaration and the promise of the defendant to pay the debt which the plaintiff was seeking to recover, the one proved, were identical, although the defendant at the time of the promise promised to pay another debt to a third party.

In the case at bar the promise to insure, etc., does not contain the exception or proviso in words, but refers to it, reading "except as hereinafter provided." In such case it has been ruled that when the covenant or clause, although it does not contain the exception or proviso, refers to it by such words as "except as hereinafter excepted," the exception or proviso must be stated in the declaration, for "*verba relata inesse videntur*." Heard's Civ. Prec. 16; *Vavasour v. Ormrod*, 6 B. & C. 430.

Included in the contract and following the promise of the defendant to insure, etc., are many stipulations and provisions relating to the rights of the parties, making the policy in some cases void, giving directions in case of loss, etc. The counsel for the defendant has ably argued that these provisions should be alleged and set forth in the declaration. We think in this he is in error. The promise of the defendant as made, whether absolute or conditional, must be accurately stated, but it is by no means necessary that parts of the contract should be stated which are distinct and collateral provisions, or, respect only the liquidation of damages under particular circumstances, without extending to absolve the defendant from responsibility. Ch. Pl. 314; *Clarke v. Gray*, 6 East 658 :

"If the covenant or clause in an agreement is absolute in itself, without any exception or proviso, nor reference to any, it may be stated as an absolute contract, although in a distinct part of the instrument there is a proviso defeating or qualifying it under certain circumstances ; such a proviso is in the nature of a defeasance, and must be set up, if the facts permit it, by the other side."

Bennett, J., in *Woodstock Bank v. Downer*, 27 Vt. 482,

speaks of provisions in an agreement as "matter in discharge of the contract which may be omitted in the declaration, and to be treated as matters of defence."

Of this class of cases *Tripp v. Vermont Life Ins Co.*, 55 Vt. 100, is in point. This latter case is cited by the plaintiff's counsel as sustaining the sufficiency of the declaration in the case at bar. The promise in that case as alleged and proven was an absolute one, and there was no necessity of alleging the collateral stipulations of the contract, and the remark of the court that the allegation "that the plaintiff kept and performed all and singular the conditions by him to be kept and performed was sufficient" would seem to be superfluous, in view of the fact that it was unnecessary to allege any conditions, and when, in fact, none were alleged. The rule substantially covering the whole subject is tersely stated by Lord Tenderden, C. J., in the case above cited of *Vavasour v. Ormrod*, 6 B. & C. 430 :

"If an act of parliament or a private instrument contain in it first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it (the general clause) must in pleading state it with the exception, and if he state it as containing an absolute unconditional stipulation without noticing the exception, it will be a variance."

The conditional or qualifying clauses in the plaintiff's policy being incorporated in the general clause of the contract should have been alleged, while it was not necessary to set out the collateral conditions which were separate and distinct, except so far as they may have been referred to by the phrase "except as hereinafter provided."

We do not wish to be understood that a condition prece-

dent need not be alleged in whatever part of the contract it may be placed.

c. The defendant raises another question of variance between the declaration and proof. The plaintiff alleges that by the contract the defendant, in case of loss, did therein and thereby undertake and promise to pay and indemnify the plaintiff for such loss or damage, to the amount not exceeding the said sum for which each item of property was so respectively insured. A general promise to pay, without limitation as to time, is a promise to pay forthwith, within a reasonable time, and such must be the construction of the promise alleged.

This is the only allegation in the declaration of the defendant's promise in respect to the time of payment. The contract in evidence provided that the insured should "give immediate notice of any loss," and that the "loss or damage should be ascertained or estimated according to the actual cash value," and that "said ascertainment or estimate should be made by the parties, or, if they differed by appraisers," etc., and "the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy." There is a material difference between the contract declared upon and the one offered in evidence. Under the one declared upon it would be the duty of the defendant in case of loss to pay the same forthwith within a reasonable time. Under the one offered in evidence the loss would not be payable until sixty days after due notice, ascertainment, estimate, and proof of loss in the manner provided by the policy. The case is similar to *Clark v. Todd*, 1 D. C. 213, in which the court say:

"The plaintiff has declared on a contract, by which the defendant promised to deliver to the plaintiff a certain quantity

of cloth, that is, according to the legal effect of the contract, to deliver the cloth to the plaintiff, at his, the plaintiff's place of abode; the contract proved is for the delivery of the cloth at the defendant's factory in Poultney, the variance is fatal."

A non-suit was entered.

There is a substantial difference between the contract alleged and the contract proven. It is clear that the defendant was not liable to pay any loss until it had been ascertained and sixty days had elapsed, or until he had refused to ascertain the amount in the manner provided in the policy. Such ascertainment and the lapse of sixty days, therefore, was a condition precedent to the payment; and if the performance of a contract depends upon some act to be done by either party or any other event, the plaintiff must aver the fulfilment of such condition precedent. Ch. Pl., 321. If the obligation of the defendant to perform its contract depends upon an event which will not otherwise appear from the declaration to have occurred, an averment of such event is essential to a logical statement of the cause of action; such is the performance of a condition precedent. The defendant, by the contract in evidence, promised to pay in sixty days after the ascertainment and proof of loss, and was under no liability until that time expired, or, there was a waiver of the proofs and time, or, it was estopped by its conduct from making that claim. Such a provision is a condition precedent. The time when the defendant promised to pay is not alleged in the declaration. It would be its duty under such a contract to pay forthwith. It is a substantial part of the contract. That the pleader regards it as material is evident from the fact that he sets forth that the loss or damage was ascertained and proofs of loss furnished in the manner required by the contract in proof, and that sixty days had elapsed. This would be an unnecessary allegation if the contract was like the one described in the declaration; but this does not cure the misdescription of the

contract in a matter so material as the time when the loss should be paid.

The defendant insists that the policy was void by reason of the foreclosure proceedings. The decree of foreclosure was obtained in June, 1890, and was running when the policy was dated in January, 1891; the decree expired June 16, 1891. This claim is based upon the clause in the policy which reads, "If with knowledge of the insured foreclosure proceedings be commenced, by virtue of any mortgage, * * * the policy shall be void." We think this clause refers to foreclosure proceedings begun after the date of the policy, and not to those already commenced. In case of a policy with like provision, the applicant stated in his application that no foreclosure proceedings had been begun, but afterwards and before the policy was dated, such proceedings were commenced, and it was held the company was bound. *Day v. Hawkeye Ins. Co.*, 72 Iowa 597, 17 Ins. Law Jour. 143; and see *Phenix Ins. Co. v. Union M. Life Ins. Co.*, 101 Ind. 392, 14 Ins. Law Jour. 461.

That the policy was void by reason of any concealment or misrepresentation of material facts is a question not raised by the record, and therefore is not considered.

Judgment reversed and cause remanded.

STATE v. EDDIE J. HOLLENBECK.

MAY TERM, 1894.

Rape. Cross-examination of prosecutrix. Intercourse with other men. Relations with respondent. Evidence.

1. The respondent in a prosecution for rape may inquire of the prosecutrix upon cross-examination whether she had intercourse with a certain person at about the time of the alleged offence.
2. He may also show upon such cross-examination that the relations between himself and the prosecutrix were friendly and cordial before the alleged offence and continued equally so afterwards.
3. Where the right of cross-examination is denied at the time when it should have been allowed, the error is not cured by subsequently recalling the witness and offering to the excepting party the privilege of cross-examination which he desires.
4. Evidence that a third person, at the request of the prosecutrix but not in her presence, told her mother of the alleged rape, is inadmissible.

Indictment for rape. Plea, not guilty. Trial by jury at the September term, 1893, Chittenden County, TAFT, J., presiding. Verdict, guilty. The respondent excepts.

The prosecutrix was fourteen years of age and a member of the family of Geo. Hollenbeck, a brother of the respondent. The testimony showed that soon after the alleged offence she informed Mrs. Hollenbeck what had happened

and requested her to tell Mrs. Gilman, the mother of the prosecutrix. Thereupon the state introduced Mrs. Gilman as a witness, who was permitted to testify, against the objection and exception of the respondent, that Mrs. Hollenbeck did tell her, not in the presence of the prosecutrix, of the complaint which had been made to her.

The other questions decided sufficiently appear in the opinion.

J. A. Brown for the respondent.

The respondent should have been permitted to cross-examine the prosecutrix as to her intercourse with Billet. *State v. Johnson*, 28 Vt. 512; *State v. Reed*, 39 Vt. 417.

J. E. Cushman, state's attorney, for the state.

START, J. The respondent is charged with having committed the crime of rape. The prosecutrix was a witness for the state, and, on cross-examination, was inquired of as to whether, at about the time the alleged offence was committed, she had intercourse with one Billet. The court excluded the question and the respondent excepted. This inquiry was proper on cross-examination, and should have been allowed. The precise question presented by this exception was decided in favor of the respondent in *State v. Johnson*, 28 Vt. 512, and in *State v. Reed*, 39 Vt. 417, and an extended consideration of the authorities upon the subject is unnecessary.

The fact that the state, later in the trial, called the prosecutrix as a witness upon the same subject, and the respondent had an opportunity to cross-examine and declined to do so does not deprive him of the benefit of this exception. He had a right to examine her upon this subject at any time during her cross-examination. At the time he proposed to examine her upon the subject of her relations with Billet, she had not been

inquired of by the state in respect to the matter. Therefore a cross-examination upon the subject at that time might have been of material advantage to him; for if the prosecutrix was untruthful, she would naturally be better prepared to withstand a cross-examination after her attention had been called to the subject by inquiries made by the party calling her.

While the prosecutrix was being cross-examined by the respondent, he proposed to show by her that her relations with the respondent were friendly and cordial at the time of the alleged commission of the act complained of, and continued so thereafter. This was excluded, and the respondent excepted. While the respondent was putting in his evidence in defence, the court told him he could examine the prosecutrix upon this subject, and he declined to do so. The respondent had a right to inquire of the prosecutrix in regard to this matter while he was cross-examining her, and the denial of that right was error. He had a right to make this inquiry in cross-examination with a view to discrediting the evidence of the witness. Her testimony tended to sustain all the allegations in the indictment; she was a material witness, and probably the only witness, upon the question of whether the act complained of was by force and against her will. If she sustained friendly and cordial relations with the respondent before and after the act complained of, the fact that such relations continued would have a strong tendency to discredit her claim that the act was by force and against her will, and render it more probable that the act was without force and with her consent. The respondent had a right to discredit the story told by her, by cross-examination, if he could. He was not obliged to defer the examination upon this subject until he came to his side of the case, and then call her as his own witness and undertake to discredit her story by direct inquiries. In cases of this kind great latitude is and should be allowed in conducting a

cross-examination. Usually the prosecutrix is the only witness upon the question of whether the act was by force and against her will, and without her testimony no conviction can be expected. It is all important to the respondent that he discredit her testimony, and usually his only means of doing this is by cross-examination. If he cannot cross-examine the prosecutrix with a view to discrediting her story, he is deprived of the substantial benefits of a cross-examination. In *State v. Reed, supra*, it is said that the defence, in cases of this nature, usually rests mainly upon circumstances, and the cross-examination of the party who claims that she has been forced. Such cross-examination should, therefore, be allowed to be as unrestricted and searching as is consistent with the rules of law.

The testimony of Mrs. Gilman, in respect to what Mrs. Hollenbeck told her about the prosecutrix complaining of the alleged offence, was clearly hearsay evidence and should have been excluded. It was introduced, and was doubtless considered by the jury as confirmatory of the evidence given by the prosecutrix, and must have been prejudicial to the respondent.

Exceptions sustained, judgment and sentence reversed, and cause remanded for new trial.

Thompson, J., being employed in county court, did not sit.

MAGGIE B. SEMMIG v. HIRAM MERRIHEW.

OCTOBER TERM, 1894.

Construction of will. Waiver of rights. By paying over funds. By settling account. Assumpsit will not lie.

The plaintiff's husband by will, in which she was named executrix, bequeathed her all his personal property, made his debts a charge upon his real estate, and devised such real estate, subject to the payment of his debts and expenses, to the plaintiff and his daughter equally, provided that if the daughter should die before reaching the age of eighteen, the plaintiff should take the whole. The will gave the plaintiff full control of this real estate until the daughter became eighteen, and further provided that the plaintiff might, at her election, convert it into money, pay off a small incumbrance which rested upon it, and divide the balance between herself and daughter. The plaintiff elected to sell, and paid over to the defendant, as guardian for the daughter, one-half the balance. Subsequently, and before becoming eighteen, the daughter died. The question being whether the plaintiff was entitled to the daughter's share, *held*,

1. The sale of the real estate did not affect the rights of the parties, for, upon a fair construction of the will, the plaintiff held the proceeds after the sale in exactly the same way that she did the land before.
2. The plaintiff did not lose her claim by paying over the money, for while the payment was a voluntary one and made with full knowledge of the terms of the will, she did not know that the daughter would die before reaching eighteen, and that she would therefore have an interest in her share, and she cannot be said to have waived a right of the existence of which she did not know.
3. The plaintiff lost nothing by the decree of the probate court,

settling her account as executrix, in which she was credited with the payment of the daughter's share to the defendant, nor did the defendant gain anything by filing in that court his guardian account subsequently to the death of his ward, it not appearing that the court had taken any action thereon.

4. Since the defendant holds this fund as a trustee under the direction of the probate court, assumpsit will not lie against him for its recovery, certainly not until he has settled his account in that court and a decree has been made directing the payment to the proper persons.

Assumpsit. Heard upon an agreed statement of facts at the April term, 1894, Chittenden county. Judgment for the defendant. The plaintiff excepts.

The material part of the will was as follows :

"It is my will that all my just debts and funeral expenses be paid and discharged as soon as conveniently may be after my decease, out of the proceeds of my real estate.

"I give and bequeath unto my beloved wife, Maggie B. Chittenden, and her heirs and assigns, all the personal property, together with all the household furniture.

"I give, devise and bequeath to my said wife, Maggie B. Chittenden, and my daughter Ethel Chittenden, and their heirs forever, to be equally divided between them, all my real estate, consisting of seventy-five acres of land, more or less, situated on both sides of Dorset street in said South Burlington. Provided, if my said daughter, Ethel L., should die before attaining the age of eighteen years, then it is my will that the whole of my real estate should go to my wife, Maggie B.

"The above grant of real estate is subject, however, to the above provision for the payment of my debts and funeral expenses.

"And furthermore, it is my will that my said wife, Maggie B., shall have entire control of the whole of my real estate until the time that my daughter, Ethel L., shall arrive at the age of eighteen years. Unless she, the said Maggie B., shall think best to sell and dispose of said real estate before that time, then said Maggie B. is to have full power and authority to sell the same and to divide the proceeds of such sale (after paying the debts) with the said Ethel L. equally.

"I do hereby nominate and appoint my esteemed friend, Hiram Merihew, of said South Burlington, guardian of my daughter, Ethel L., until the said Ethel L. arrives at the age of eighteen years, or intermarries, without bonds.

"I do hereby nominate and appoint my said wife, Maggie B. Chittenden, executrix of this, my last will and testament, without bonds."

The remaining facts are fully stated in the opinion.

Hard & Bliss for the defendant.

The plaintiff, with full knowledge of all the facts, paid over this money to the defendant voluntarily, and having done so cannot now recover it. 1 Chitty Pl., 367; 1 Pars. Cont. (6th Ed.), 466; 4 Wait's Act. and Def., 478; *Brisbane v. Dacres*, 5 Taunt. 144; *Bilbie v. Lumley*, 2 East. 469; *Forbes v. Appleton*, 5 Cush. 115, 117; *Wheatley v. Waldo*, 36 Vt. 237, 243; *McDaniels v. Bank of Rutland*, 29 Vt. 230, 239; *Peterborough v. Lancaster*, 14 N. H. 382, 388.

The action of the probate court upon the settlement of the plaintiff's account as executrix was, in effect, a decree of this money to the daughter. *Ward v. Church*, 66 Vt. 490.

Seneca Haselton and Charles T. Barney for the plaintiff.

The clear intention of the testator was that the plaintiff should have the whole of this property if the daughter deceased before reaching eighteen. That intention should have effect. 1 Redf., Law of Wills, (2d Ed.) 433; *Corrigan v. Kiernan*, 1 Bradf. Sur. Rep. 208; *Brown v. Lyon*, 6 N. Y. 419; *Gray v. Minnethrope*, 3 Vesey, Jr., 103; *Constantine v. Constantine*, 6 Vesey, 100; *Homer v. Shelton, Exr.*, 2 Met. 202; *Randall v. Joslyn*, 59 Vt. 557; *Chrystie v. Phyfe*, 19 N. Y. 344; 1 Jar., Wills, (6th Ed.) 472; *Richardson v. Paige*, 54 Vt. 373; *Executor of Judevine v. Judevine*, 61 Vt. 587; *McMurry v. Stanley*, 69

Texas 227; *Roseboom v. Roseboom*, 81 N. Y. 356; *Campbell v. Beaumont*, 91 N. Y. 464; *Freeman v. Coit*, 96 N. Y. 63; *Darbell v. Hartt*, 137 Mass. 218; *Parker v. Isige*, 138 Mass. 416.

If the estate vested in the daughter upon payment to the defendant, it would still be determinable upon her death before reaching eighteen. *Dodd v. Winship*, 99 N. Y. 505; *Randall v. Joslyn*, 59 Vt. 562.

ROSS, C. J. I. The plaintiff was the wife of Albert M. Chittenden, deceased, and the executor of his will. The principal contention is as to the plaintiff's rights under the will—which was duly probated—to the amount paid by her to the defendant as guardian of the testator's daughter, Ethel L., who died before she attained the age of eighteen years. The testator, by his will, charged his real estate with the payment of his debts and funeral expenses. He gave all his personal property and household furniture to the plaintiff. Then, subject to the payment of his debts and funeral expenses, he devised his real estate to be divided equally between the plaintiff and his daughter, Ethel L., with the proviso that if Ethel L. shall die before attaining the age of eighteen years, then the whole real estate is given to the plaintiff. From this clause of the will, standing alone, the daughter, subject to the payment of his debts and funeral expenses, took one-half of the real estate in fee, with a conditional limitation or subject to be defeated, on the happening of the condition named. On the happening of the condition, the plaintiff took the whole real estate. The daughter died before attaining the age of eighteen years. If at the time of her decease the property had remained real estate, the plaintiff would have been entitled to the whole of the real estate charged with the payment of the debts and funeral expenses of the testator. The real estate was incumbered with the payment of an annuity

and a small mortgage. The will gives the whole control of the real estate to the plaintiff until the daughter becomes eighteen years old. Then, evidently thinking that caring for the real estate, which consisted of seventy-five acres of land, and the payment therefrom of the mortgage and annuity, might become burdensome to the plaintiff, the testator adds the further provision, that if the plaintiff should think best to sell the real estate before the daughter reached the age of eighteen years, she should have full authority to make the sale, and, after paying the charges thereon, divide the proceeds of the sale equally with the daughter. The plaintiff exercised this authority, sold the real estate, paid the charges, divided the remainder of the proceeds, and paid over one-half of them to the defendant, who had been appointed guardian of the daughter. The contention is first, whether by exercising the power and selling the real estate the plaintiff lost the right which she would have had, to the whole of the real estate, on the death of the daughter, or whether upon the death of the daughter she had the same right to the proceeds of the sale, which she would have had to the property sold. On the condition which has happened, if the property had remained in its original state, it is the clearly expressed purpose of the testator to give the plaintiff the whole of the real estate. This clearly expressed devise to the plaintiff will not be defeated unless the later provision in regard to the disposal of the proceeds of the sale—if the sale should be made—is clearly inconsistent with and repugnant to it. It is the duty of the court so to construe the will as to give force to every provision and clause, if it can reasonably be done, and so as to avoid rather than create a repugnancy between the different clauses and provisions of the will. The later provision fixes no time when the plaintiff is required to divide the proceeds of the sale with the daughter. She might well retain the proceeds of the sale until the daughter reached the required age to be entitled to

receive it herself. What immediately precedes the clause, requiring the plaintiff to divide the proceeds of the sale with the daughter, gives the plaintiff entire control of the real estate until the daughter becomes eighteen years old, and points to that age as the time when the proceeds shall be divided with her, if the sale is made. As a matter of caution, if the power of sale should be exercised, the testator provides that the proceeds shall stand in the place of the real estate, and be divided between the plaintiff and the daughter. But the provision for a sale contains no intimation that plaintiff will be debarred of any rights previously given by the testator, if she exercises the power of sale. These provisions, disposing of the real estate and of the proceeds derived from its sale, if the plaintiff shall judge best to exercise the power, create in and of themselves no necessary repugnancy. We think the testator intended to give, and did give, the plaintiff the same right to the proceeds of the sale of the real estate which he gave her to the real estate. Hence, if the plaintiff had retained the proceeds of its sale in her hands until the occurrence of the death of the daughter, she would have had the right to retain the whole of the proceeds left after the charges upon the real estate had been paid.

II. It is further contended that by paying the share of the daughter over to her guardian, the plaintiff has deprived herself of the right to recall it, because it is claimed that such payment was voluntarily made, with a knowledge of all the facts and provisions of the will. The payment, so far as appears, was voluntarily made by the plaintiff. She also knew the provisions of the will. While the plaintiff then knew that the daughter might die before she became eighteen years old, and that if the daughter did so die she would be entitled to the whole of the residue of the proceeds of the sale, she did not know, and could not know, at that time, whether the event would happen that would give her

the right to such proceeds. Whether the daughter would die before she was eighteen years old or not, was material and determinative of the plaintiff's right, or failure of right, to this portion of the estate. When she paid the money in controversy to the guardian, the plaintiff had no knowledge whether this controlling, determinative fact, would ever exist. Hence, she was ignorant whether a most material fact in regard to her right would ever exist when she made the payment. By making the payment, when and as she did, she did not waive a right which she did not know would ever exist, a right dependent on a limitation which might or might not ever exist. Hence, her right to this portion of the estate has not been lost or defeated by her payment of it to the defendant, as the guardian of the daughter Ethel.

III. The defendant further contends that the plaintiff has lost her right to the fund in the hands of the defendant by the decree of the probate court in settling and allowing her account as executrix. In that settlement she is allowed for paying this fund to the defendant as guardian of the daughter Ethel L., "being her equal share of the proceeds of the real estate as provided by the will of the testator." The will, as we have shown, gave Ethel L. this share of the proceeds, subject to be defeated, and given to the plaintiff, if Ethel L. should die before attaining the age of eighteen years. This allowance does not profess to adjudicate the plaintiff's right to this fund, on or after the happening of the condition of defeasance. It could not, as when made the condition had not happened, and it was not known that it would happen. The defendant, as required by law, filed his guardian account to January, 1893. The record does not show that the probate court took any action upon it, nor that there were any such parties before it that it could settle his account. The filing of the account was subsequent to the death of the ward. But without proper parties being called before it, and an adjudication settling the account and

ordering the fund paid to some one, the plaintiff could not be harmed nor concluded by the defendant's filing his account in the probate court. By the action of the probate court the plaintiff has not lost her right to this fund.

IV. There is, however, another view—which has not been urged in this court—against the plaintiff's right to maintain general assumpsit to recover this fund. The case does not state in terms the form of the action, but in the briefs, on both sides, it is assumed to be general assumpsit.

The defendant holds this fund in trust. He is a trustee appointed by the probate court, and under bonds. His ward has deceased. He has no interest in the fund further than payment for his services. The ward having deceased, he holds the fund for the person legally entitled to it. It is a trust peculiarly under the control of the probate court. It there arose, and is there being administered. There his account is to be finally settled, and such order made in respect to its disposition as the law requires. R. L. 2488. *Farewell v. Steen*, 46 Vt. 678. Assumpsit will not lie against such trustee, certainly not until the account is settled, and an order of payment made by the probate court. *Congdon v. Cahoon*, 48 Vt. 49; *Foss v. Sowles*, 62 Vt. 221. As a trustee he is not called upon to litigate with the plaintiff the rights of the heirs at law of his ward. They are not before this court, and cannot be concluded by its decision. While the case might have been disposed of on this view alone, the other points decided are properly raised, discussed and considered. Hence we have passed upon them as was desired by the parties represented.

Judgment affirmed.

NATHAN T. SPRAGUE

v.

WILLIAM C. FLETCHER.

OCTOBER TERM, 1894.

Sale of bank stock for taxes. Demurrer.

1. To support an action on the case, the facts, well pleaded, must show an invasion of a legal right of the plaintiff, with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury.
2. The only manner in which bank stock can be sold in satisfaction of a tax is that pointed out in No. 11, Acts of 1882, and to allege that the defendant, as tax collector, having in his hands a regular warrant for the collection of a tax against the plaintiff, levied upon and sold the plaintiff's stock in satisfaction of said tax, sets forth that the plaintiff was divested of his title to his stock.
3. But to say that the defendant, as tax collector, held a *pretended* tax against the plaintiff is not an allegation that he held such warrant.

Action on the case. The declaration contained ten counts, of which five were in trover, in the common form, and five, viz., the first, third, fifth, seventh and ninth, with special counts in trespass on the case. The defendant filed a general demurrer to each of the five special counts. Heard upon such demurrer at the March term, Rutland county, 1894, MUNSON, J., presiding. The court overruled the demurrer and adjudged the counts sufficient, to which

the defendant excepted. Exceptions certified to the supreme court before trial in the county court.

The five counts demurred to were in substance the same, and each was as follows :

“ In a plea of trespass on the case, for that the defendant, on the seventeenth day of January, 1894, at Brandon, in the county of Rutland, was the collector of taxes for the said town of Brandon, and, acting in that capacity and as such, pretended to hold a tax for collection against the plaintiff. And the plaintiff says that he, the plaintiff, was then and there the owner of and held title to one share of the capital stock of the First National Bank, of Brandon, a corporation existing by virtue of the laws of the United States, and located and having its place of business at said Brandon, at the value of two hundred dollars; and that the defendant did then and there levy upon and sell said one share of stock in satisfaction of said pretended tax, without right, whereby he, the plaintiff, was then and there divested of his title in and to said stock, and wholly lost the use and value of the same.”

J. C. Baker and *C. M. Wilds* for the defendant.

The special counts do not state a cause of action. They do not allege any invasion of the plaintiff's ownership of the stock. The plaintiff's title and possession to the stock has not been disturbed. *Clark v. Smith*, 52 Vt. 529; *Sowles v. Soule*, 59 Vt. 134.

E. J. Ormsbee, *C. M. Willard*, and *C. A. Prouty* for the plaintiff.

An action on the case lies for the result of a tort not committed with force, actual or implied. Chitty, Pl., *148.

At common law shares of stock could not be taken in execution, for they were not things tangible, and did not admit of a tangible possession. *Cook, Stock and Stockholders*, s. 480.

Prior to the passage of No. 11, Acts of 1882, bank stock

could not be levied upon and sold for taxes in this state. *Barnes v. Hall*, 55 Vt. 420.

It can only be levied upon now in accordance with that act, and the officer in levying upon and selling it cannot invade the manual possession of the owner, and cannot, therefore interfere with that possession. *Chitty*, Pl., *147, *160; *Neiler v. Kelley*, 69 Penn. 407; *Cook, Stock and Stockholders*, s. 575; *Kortright v. Buffalo Com. Bank*, 20 Wend. 90.

ROSS, C. J. The contention is in regard to the sufficiency of the several counts in case, demurred to. In substance they are alike. The essential facts, admitted by the demurrer are, that the defendant was a collector of taxes, acting in that capacity, and pretended to hold a tax for collection against the plaintiff; that the plaintiff was the owner of bank stock of value, and that the defendant levied upon and sold the bank stock, without right, in satisfaction of the pretended tax. The allegation, "whereby the plaintiff was divested of his title to the stock and wholly lost its use and value," is the conclusion of pleader.

To be justified it must be supported by sufficient, proper allegations, antecedently pleaded, so that the court can see that the conclusion of the pleader is one which the facts already set forth will uphold.

To support an action on the case the facts, well pleaded, must show an invasion of a legal right of the plaintiff, either with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury. *Griffin v. Farewell*, 20 Vt. 151; *Troy v. Aiken*, 46 Vt. 55. The right alleged to have been invaded was the plaintiff's right in and to the shares of bank stock. This is an intangible right, incapable of manual possession. It can be invaded, in the collection of a tax, only in the manner prescribed by Sec. 2, of Act No. 11, of the Laws of 1882.

This act requires that the collector, after duly advertising and selling the stock, shall leave with the clerk of the corporation a copy of his warrant with his return of his doings thereon, giving a description of the property distrained, and the character and amount of the tax. When the collector has done this, it is made the duty of the proper officer of the bank to transfer the stock to the purchaser, and issue to him a certificate thereof. If the allegations of the facts, well pleaded, show all this to have been done without right, they show such an invasion of the plaintiff's right to the stock as will support an inference of loss by the plaintiff.

The allegation, that the defendant levied upon and sold the plaintiff's stock without right, in satisfaction of the pretended tax, is sufficient to show that the collector did what the law requires to be done to make a levy and sale, if supported by an antecedent allegation that the defendant, in his capacity as collector, had in his hands for collection against the plaintiff a tax bill and warrant, legal in form, although invalid, because the tax was not legally assessed. The only allegation that the defendant as collector had in his possession for collection such a tax bill, with a proper warrant for its collection, is that as collector he "*pretended* to hold a tax for collection against the plaintiff." A *pretence* is a show, or a holding forth in form, something which does not, in fact, exist. This allegation then is, that the defendant claimed, or made a show of holding a tax for collection against the plaintiff, when he did not hold any, in fact. It falls short of alleging that he held against the plaintiff, for enforcement, a tax bill, with a warrant for its collection, in form regular and valid, but invalid for reasons which did not appear upon the face of the papers. Such a tax might possibly be characterized as a pretended tax. But an allegation that the defendant held a pretended tax is entirely different from the allegation that he pretended to hold a tax. A demurrer to the former would admit that he held a tax, in

form, though claimed to be invalid; to the latter that he claimed, or made a show, of holding a tax which he did not hold. If by this allegation the pleader meant that the defendant held a pretended tax, it cannot be given that meaning, as the other is the proper one on the sentence as framed by the pleader, and his language must be taken most strongly against him. In this particular all the counts are lacking in substance.

Judgment reversed, demurrer sustained, counts adjudged insufficient, and cause remanded.

FRANCES A. PURDY

v.

ESTATE OF JOHN D. PURDY.

JANUARY TERM, 1894.

Insolvency. Wife may prove note of husband. Is competent witness. Power of county court on appeal.

Non-negotiable claim may be allowed in name of real owner. Harmless error in charge.

1. A wife may prove as a debt against the insolvent estate of her husband his note which has become her property by inheritance.
2. The rule as to what equitable demands may be proved is the same with insolvent estates as with the estates of deceased persons.

3. The wife is a competent witness in a suit to establish her claim against the insolvent estate of her husband.
4. That a debtor claimed an offset in his tax inventory on account of a particular indebtedness one year and did not the next has, of itself, no tendency to show the indebtedness paid.
5. The county court, upon appeals in insolvency, has the same powers that the court of insolvency had in the first instance.
6. A non-negotiable claim, which has been assigned, may be proved against an insolvent estate in the name of the real owner.
7. So if a wife has received by inheritance a note signed by her husband she may prove it in her name against his insolvent estate, although it is not negotiable in form, or, being negotiable, has not been endorsed.
8. A judgment will not be reversed by reason of an erroneous instruction which could not have prejudiced the excepting party.

Appeal from an order of the court of insolvency for the district of Manchester, allowing the claim of the plaintiff against the insolvent estate of John D. Purdy. Trial by jury at the June term, 1893, THOMPSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

Butler & Moloney for the defendant.

The wife was not a competent witness. The statute of 1884 did not authorize suits between husband and wife, and can have no bearing on this question. *Smith v. Gorman*, 41 Me. 405; *Libby v. Berry*, 74 Me. 286; *Barton v. Barton*, 32 Md. 214; *Wiley v. Hunter*, 57 Vt. 486, and cases cited; *Larabee v. Wood*, 54 Vt. 452; *Wells v. Tucker*, 57 Vt. 228.

Testimony that the husband promised his wife to pay the note was improperly admitted. A husband and wife cannot

contract with each other. *Ellsworth v. Hopkins*, 58 Vt. 705.

J. C. Baker for the plaintiff.

The wife was a competent witness. The husband had no interest in his insolvent estate after its assignment to the assignee. R. L., ss. 1811, 1820, 1822; *Cramton v. Valido Marble Co.*, 60 Vt. 291; *Bank v. Waite*, 57 Vt. 608; *Willey v. Hunter*, 57 Vt. 479.

Testimony that the husband promised the wife to pay this note was properly admitted. *Drew v. Corliss*, 65 Vt. 650.

MUNSON, J. The plaintiff, the wife of an insolvent debtor, seeks to have allowed against her husband's estate in insolvency, a note given by him to her grandfather's estate, and subsequently transferred to her. Her evidence tended to show that she received the note as heir-at-law of her grandfather in the distribution of his estate, and that her husband afterwards promised payment to her.

If the note of the plaintiff's husband held by her grandfather's estate was received by the plaintiff as a part of her inheritance, it thereby became her sole and separate property. The claim was as good against the husband in her hands as in the hands of her assignor, but she could not have enforced it against him at law because of the technical bar arising from the coverture. It is claimed that inasmuch as the plaintiff's only remedy against her husband was in equity, she cannot prove her claim against his estate in insolvency. It is said that the husband's note in the hands of the wife is an equitable demand, and that the statute does not authorize the allowance of equitable demands in insolvency.

In *Spaulding v. Warner's Est.*, 52 Vt. 29, the court considered the question whether equitable demands could be allowed by commissioners on the estates of deceased per-

sons, and made a distinction between claims of a purely equitable character and those recoverable at law but for some technical rule. It is there said that when the claim "is of such a nature that the right of the party presenting it to recovery, as well as the extent of such recovery, is apparent and readily ascertainable, and the claim capable of being enforced in his favor, except for some technical rule of the common law, the commissioners have jurisdiction; but where resort to chancery is necessary, to ascertain and establish the right of recovery or the extent of that right, the claim is of a purely equitable character, and commissioners have no jurisdiction over it."

We do not think the difference between the language of the probate law and that of the insolvent law in regard to the allowance of claims is such as to require different holdings upon this subject. We see no reason to fear that any practical difficulty will result from following the course already adopted in the case of estates of deceased persons; and it seems desirable that the line of procedure in both classes of estates be the same. Then the right of the plaintiff to prove her claim in insolvency is to be determined by the rule above stated, and when tested by that rule her right to do so is apparent. A resort to equity is not necessary to establish her right or determine the extent of it. The debt due from her husband was not an equitable demand in its origin or nature. It was such only as regarded the manner of its enforcement. It is a demand properly recoverable at law upon the removal of the technical bar which stood in the way of a suit at law. The insolvent debtor is not the defendant in these proceedings.

We think the plaintiff was a competent witness in support of her claim. Our decisions bearing upon this question are not in perfect harmony, but upon a review of them it was held in *Willey v. Hunter*, 57 Vt. 479 (488) that to render the wife incompetent as a witness the husband must be an actual or real party to the suit, and that his having a collat-

eral interest in the event of the suit would not be sufficient to disqualify her. The only pecuniary interest the plaintiff's husband has in this proceeding arises from the effect it may have on the question of his discharge. But it does not appear that the situation of the estate is such that the result of this proceeding will be determinative of the question of discharge. If such an interest as this were to be held sufficient to disqualify, the fact that it may exist will not entitle the defendant to a reversal. In *Willey v. Hunter* the wife of the plaintiff administrator was the sole heir to the estate, but it did not appear but that the whole estate would be required to pay the debts proved against it, and it was said :

"It is necessary for a party objecting to a witness as incompetent, on account of interest in the result of the suit, to show affirmatively the disqualifying interest."

The offer to show that the insolvent gave in this indebtedness to the listers as an offset the year before the plaintiff's grandfather died and did not afterwards, was properly excluded. He was under no obligation to enter all his indebtedness in the list of debts for which offset was claimed, and if he owed an amount in excess of his personal property would have no interest to do so. Assuming that there was also evidence tending to show that this action was with the plaintiff's knowledge and concurrence, the excluded testimony would have shown nothing inconsistent with the validity of her claim.

It appears from the charge that the evidence tended to show that the note was payable to the estate of Townshend, and that it did not disclose whether it was negotiable or not. The court received evidence offered by the plaintiff to show that her husband agreed to pay the note to her, and instructed the jury that she could recover if, after she became the owner of the note, there was a promise by the husband to pay it to her. To the admission of this testimony, and to the giving of this instruction, the defendant excepted. If it

were to be held that the action of the court in these particulars was error, this would not require a reversal of the case, if the plaintiff was entitled to recover without the finding of this further fact, and if it is clear that the defendant was not otherwise prejudiced by the evidence.

It is said in *Spaulding v. Warner's Est.*, 52 Vt. 29, that commissioners of claims have the power and duty to ascertain and allow all claims against the estate without regard to the legal form in which it would be necessary to prosecute them in courts of common law jurisdiction. It is said in *Holdridge v. Holdridge's Est.*, 53 Vt. 546, that proceedings in the probate court are not governed by common law rules as to parties or forms of action. All this may be said with equal truth of proceedings in insolvency. The proceedings in both courts are to procure an adjustment of all claims against the estate, preparatory to its settlement or division. County courts have the same powers as courts of probate and insolvency in determining appeals from those courts. It would be highly detrimental to the interests of all parties to require suits in equity to establish claims which could be as easily ascertained in the courts specially provided for the settlement of these estates. Moreover, a careful consideration of the facts in *Spaulding v. Warner's Est.* will show that that case is determinative of the very point under consideration. In that case the estate sought to set off against the claim of a creditor a sum which the creditor had promised other parties that he would pay on an obligation due from such parties to the intestate. The court permitted this, without determining whether the intestate could have maintained an action against the plaintiff on the facts stated in a court governed by the technical rules of the common law.

If this note was assigned to the plaintiff by the probate court in the distribution of her grandfather's estate, she was by virtue of that assignment the real owner of the claim,

and was entitled to any dividend which might be declared upon it. We think the court of insolvency could have allowed the claim to the plaintiff upon proof of this assignment and ownership, even if the note was non-negotiable or payable to order and not endorsed. It follows that the county court could have permitted a recovery without submitting the question of a subsequent promise by the husband. It was not necessary that the jury should find the further fact which the testimony excepted to was offered to establish. The case as presented discloses no other controverted matter upon which this evidence could have prejudiced the defendant.

Judgment affirmed.

FIRST NATIONAL BANK OF CHELSEA

v.

J. G. FITTS.

MAY TERM, 1894.

Renewal of note procured by misrepresentation of third person. Chattel mortgage. Sufficiency of description.

1. The defendant, being liable as principal to the plaintiff upon a promissory note, was adjudged an insolvent. During the pendency of insolvency proceedings and after the granting of his discharge, he was induced by the false representations of a surety on the note and the assignee in insolvency to the effect that the note had not been allowed against his insolvent estate, and that his liability upon it would not be relieved by his discharge, to sign from time to time renewals of the note. *Held*, that he could not avoid his liability upon the last of these renewals by reason of such false representations, for the parties who made them did not represent the persons.
2. A description in a chattel mortgage may be good as between the parties, and entirely insufficient as to third parties.
3. The description "all growing grass on my home place, except sufficient for ten tons of hay; all growing crops, except what the law exempts, on said home farm," is good as between the parties.
4. The mortgage is not void, because no provision is made for separating the exempt from the non-exempt.

Trover, for certain hay and farm products. Heard at the December term, 1893, Orange county, upon the report of a

referee, START, J., presiding. Judgment *pro forma* for the defendant to recover his costs. The plaintiff excepts.

The plaintiff claimed title to the property in question, under a chattel mortgage, from the defendant to itself. The referee found that the defendant had appropriated the property in question and had thereby converted it, if the title of the plaintiff was a valid one. The defendant denied the validity of the plaintiff's title; first, because the note, to secure which the mortgage was given, was invalid; and secondly, because the mortgage itself was void by reason of the indefiniteness of the description of the property mortgaged.

In reference to the first point, it appeared that the note in question was given in renewal of a note originally dated October 13, 1884, and payable to the plaintiff bank. The defendant obtained the money on this note from the plaintiff and procured one Moses Spear to sign with him as surety. November 25, 1884, the defendant was adjudged an insolvent debtor upon a petition dated October 22, 1884, and such proceedings were had that February 20, 1886, he received a discharge in insolvency discharging him from all debts existing previous to said October 22.

The plaintiff proved its debt against the insolvent estate, but whether it received a dividend, or what dividend, did not appear.

April 13, 1885, the note was renewed, and was again renewed from time to time thereafter down to April 8, 1889, when the note secured by this mortgage was given.

Before the renewal of the note on April 13, 1885, the said Spear saw the defendant, gave him a bank note to sign to renew the other, and told him that the court of insolvency would not allow the proof of the note, and that the defendant would have the note to pay. Subsequently the defendant applied to one Porter, his assignee in insolvency, and was informed by Porter that the note had not been allowed against the estate. In signing the renewal on April 13, the

defendant relied upon the representations of Spear and Porter, and he did not know, until after the giving of the note and mortgage in question, that those representations were not true. The referee found that the defendant would not have signed the note of April 13, 1885, nor the renewals, including the note secured by the mortgage in question, had it not been for the aforesaid false representations of Spear and Porter.

Neither the plaintiff nor any of its officers knew what had passed between the defendant and Spear and Porter in reference to the renewal of the note, or what had been said to induce the plaintiff to renew it.

The description in the chattel mortgage was as follows :

"One black mare and one baby colt and their increase, all growing grass on my home place except sufficient for ten tons of hay, all growing crops except what the law exempts on the said home farm, and all the farming tools on said premises."

J. K. Darling for the plaintiff.

This suit being between the mortgagor and mortgagee, no technical rule of law should be allowed to interfere in carrying out the agreement of the parties, and all parts of the mortgage should be construed together. *Cobbey, Ch. Mort.*, ss. 5, 6, 67; *Merrill v. Gove*, 29 Me. 346; 2 Kent, Com., 555.

The defendant actually owed this debt to the bank, and gave the mortgage to secure the debt, without being induced thereto by any fraudulent representations upon the part of the bank. Under these circumstances he cannot attack the security. *Noble v. Schofield*, 44 Vt. 281; *Cobbey, Ch. Mort.*, s. 773; *Bank of Skowhegan v. Maxfield*, 83 Me. 576.

The mortgage is not void for uncertainty. *Seay v. McCormick*, 68 Ala. 549.

J. H. Watson and A. M. Dickey for the defendant.

The defendant was induced to sign the note and execute the mortgage by the fraudulent representations of Spear and Porter. By accepting the note the bank made those persons its agents, and their representations its own; for it took the benefit of their act. Hence the plaintiff is responsible for their representations. *Harvester Co. v. Miller*, 72 Mich. 265; (16 Am. St. Rep. 536); *Eastman v. Provident Mu. R. Ass'n*, 65 N. H. 176; (23 Am. St. Rep. 29); *Busch v. Wilcox*, 82 Mich. 336; (21 Am. St. Rep. 563); *Elwell v. Chamberlain*, 31 N. Y. 611, 619; *Bennett v. Judson*, 21 N. Y. 238; *Presby v. Parker*, 56 N. H. 409; *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Penn. St. 398; *Mayor v. Dean et al.*, 115 N. Y. 556; *James v. Hodsden*, 47 Vt. 127; *Town's Admr. v. Waldo*, 62 Vt. 118; *Caltrill v. Krum*, 100 Mo. 397; (18 Am. St. Rep. 549); *Addington v. Allen*, 11 Wend. 374.

The mortgage is void for uncertainty. There is no provision for separating the property which is mortgaged from that which is not. *Fowler v. Hunt*, 48 Wis. 345; *Dodds v. Neel*, 41 Ark. 70; *Person v. Wright*, 35 Ark. 169; *Clark v. Vorhees*, 36 Kan. 144; *Jones, Ch. Mort.*, s. 57.

Such a mortgage would make the mortgagor and mortgagee tenants in common of the property. *Jones, Ch. Mort.*, s. 56; *Blakely v. Patrick*, 67 N. C. 40; *Spivey v. Grant*, 96 N. C. 214; *Byrd v. Forbes*, 13 Pac. Rep. 715.

START, J. It appears that the defendant as principal, and one Moses Spear assurety, on the thirteenth day of October, 1884, gave the plaintiff their promissory note. On the twenty-fifth day of November, 1884, the defendant was adjudged an insolvent debtor, and obtained his discharge. On the eighth day of April, 1885, the defendant and said Spear renewed the note thus given to the plaintiff by giving a new

note; and new notes were given by them from time to time until April 8, 1889, when the note secured by the chattel mortgage in question was given. Before the first renewal of the note Spear gave the defendant a blank renewal note to sign, and told him the court of insolvency would not allow the original note, and that he would have it to pay. Before the defendant signed the renewal note he asked the assignee of his estate if the note had been allowed, and he told him it had not. The note was renewed from time to time at the suggestion of Spear. The defendant would not have renewed the note had he known that his discharge released him from liability on the original note. The original note had in fact been allowed by the court of insolvency, but the defendant was not aware of this; and at the time he executed the chattel mortgage in question, he did not know that the statements of Spear and the assignee were untrue. Neither the plaintiff nor any of its officers knew anything of what passed between Spear, the assignee, and the defendant, in reference to the renewal of the note, nor what was said to induce the defendant to renew it.

The defendant claims that the plaintiff adopted the acts of Spear and the assignee in procuring a renewal of the note, and that it is chargeable with knowledge of the representations made by them in so doing. We do not so hold. Spear and the assignee were not acting for the plaintiff; they were not the agents of the plaintiff. Spear was acting for himself and for his own interest, and the assignee only answered an inquiry made by the defendant. It was for Spear's interest to have the defendant remain liable on the original debt, and he procured the defendant to renew the note for his own benefit, not for the benefit of the plaintiff. The plaintiff did not take any steps toward having the defendant renew the note; it was renewed by the defendant from time to time at the suggestion of Spear. When the defendant was adjudged an insolvent person and obtained his dis-

charge, he was no longer liable upon the original note. Pending the question of his discharge, the note could be enforced only against Spear. It was his duty to pay it. He did not pay it, but elected to renew it; and, in renewing it, he was acting for himself. He was not engaged in the business of the plaintiff; and the case differs in principle from the class of cases cited by the defendant, where it is held that if a principal adopt a contract of a self-constituted agent, who assumes to act for him without authority, he is bound by all acts within the scope of the assumed authority of such agent. Spear did not assume to act for the plaintiff; he was acting for himself. We, therefore, hold that the note to secure the payment of which the chattel mortgage in question was given was the note of the defendant, and that he cannot avoid the mortgage by reason of any infirmity in the note.

It is claimed that the mortgage does not contain a sufficient description of the property, and that no lien was thereby created upon any of the property sued for. The property sued for is described in the mortgage as follows:

"All growing grass on my home place, except sufficient for ten tons of hay; all the growing crops, except what the law exempts, on said home farm; and all the farming tools on said premises."

In *Parker v. Chase and Buck*, 62 Vt. 206, it is said:

"While a description need not be enough to enable one to find the property without inquiry, it must be such as to indicate the line of inquiry and furnish the basis of identification."

Applying this rule, we think the description of the grass and crops is sufficient, as between the parties. The defendant described the grass in his mortgage as growing on his home place, and the crops as growing on his home farm. He must have known the location of his home place and his home farm; and, if he did, he knew that a portion of his grass and other crops was mortgaged, and he was not labor-

ing under a mistake when he converted them to his own use. The inquiry suggested by the mortgage would lead the mortgagee to look for the mortgagor's home place and home farm at the time the mortgage was executed; and, when he had found them, he could identify the property mortgaged by inquiry suggested by the mortgage itself. As between the parties, this is all that is required. The statute relating to the execution and recording of chattel mortgages has not affected the rights of the parties to the mortgage; they remain the same as they were at common law. R. L., s. 1966. As between the parties to a chattel mortgage, any description is sufficient, if by it the mind is directed to evidence whereby it may ascertain the precise property conveyed. *City Bank v. Ratkey*, 79 Iowa 215. Written descriptions of property do not identify by themselves. They only furnish the means of identification; and, as between the parties, they are to be interpreted in the light of the facts known to, and in the minds of, the parties at the time. A description which is sufficient between the parties to the mortgage may be utterly insufficient as against third persons. As between the parties, a specific and particular description is not necessary; but, to be effectual as against third persons, it must point out the subject matter so that such persons by it, together with such inquiries as the instrument suggests, may be able to identify the property intended to be covered. *Tindall v. Wasson*, 74 Ind. 495; *Cass v. Gunnison*, 58 Mich. 108; *Tootle v. Lyster*, 26 Kan. 598; *Gurney v. Davis*, 39 Ark. 394.

The crops are described as "all the growing crops, except what the law exempts, on said home farm," and it is contended that, inasmuch as all growing crops are exempt from attachment and levy upon execution, no crops are mortgaged. Such a construction would render the mortgage, so far as it relates to crops, meaningless, and ought not to be given, if the language used admits of any other

interpretation. Words are not to be construed in a frivolous or ineffectual sense when a contrary exposition can be given; they should have a reasonable construction, according to the intent of the parties. It is clear that the parties intended some crops to be covered by the mortgage; and, to give effect to their contract, we must hold that the parties intended by the words, "except what the law exempts," to except from the operation of the mortgage such crops as would be exempt after they were severed from the freehold. We think this to be the true construction to be given to the words used. By this construction we give effect to the clear intent of the parties, and give the contract, in respect to crops, legal and actual operation.

It is claimed that the mortgage, so far as it relates to grass and crops, is void, because it contains no provision for separating the mortgaged from the unmortgaged portion. As between the parties, chattel mortgages need not contain a specific and particular description of the several articles by which to identify them from other like articles of the mortgagor. *Gurney v. Davis*, *supra*; *Cobbey on Chattel Mortgages*, s. 69; *Cull v. Gray*, 37 N. H. 428. A mortgage of one-third of twenty-one acres of growing wheat, situate in a certain place, means an undivided third of such wheat, and is a sufficiently particular description. *Zehner v. Aultman*, 74 Ind. 24. The holding in *Senis v. Mead*, 29 Kan. 88, and *Potts v. Newell*, 22 Minn. 561, is to the same effect. A mortgage of "fifty thousand pounds of cotton, to be produced during the present year," on described premises, sufficiently describes the property. *Robinson v. Mauldin*, 11 Ala. 977.

When the defendant had appropriated to his own use sufficient grass to make ten tons of hay, and the number of bushels of potatoes, wheat, corn and oats, exempt from attachment and levy upon execution, he knew that the balance of the hay and crops were holden as security for the payment

of the mortgage debt; and when he converted them to his own use, he is presumed to have done so knowing that he was converting property, the legal title of which was in the plaintiff, and in which he had only an equity of redemption. No further description of the property was necessary to enable him to say what quantity of hay and other crops should be set apart to satisfy the mortgage debt; and he has no reason to complain if he is chargeable only with the balance of the grass and other crops after deducting the quantities excepted in the mortgage. He could not have understood that he was entitled to more until the mortgage debt was paid. By holding as we do that the mortgage upon the grass and crops was valid between the parties, we give effect to the manifest intention of the parties.

The pro forma judgment is reversed, and judgment rendered for the plaintiff to recover \$303.77 and its costs.

Thompson, J., being engaged in county court, did not sit.

NATIONAL BANK OF CHELSEA

v.

H. M. MILLER AND J. G. FITTS.

MAY TERM, 1894.

Chattel mortgage. Replevin by mortgagee against officer attaching interest of mortgagor.

A mortgagee, to maintain replevin for property to which he holds title by chattel mortgage, against an officer who has taken the same in execution against the mortgagor, must show that such officer has unlawfully taken or detained the property; that is, that he holds it in a way inconsistent with the statutes permitting the attachment and sale of the mortgagor's interest. It is not enough that he has levied upon and advertised it for sale.

Replevin to recover one mare and colt. Heard upon the report of a referee at the December term, 1893, Orange county, START, J., presiding. Judgment *pro forma* for the return of the property, and that the defendants recover their costs. The plaintiff excepts.

The plaintiff claimed title to the property under a chattel mortgage, it being the same chattel mortgage drawn in question in the suit *First National Bank of Chelsea v. Fitts*, *supra*, 57.

The plaintiff placed this mortgage in the hands of one Collins, a deputy sheriff, with instructions to advertise and sell the property therein named according to law. Collins

saw the defendant Fitts and removed the property. The mare and colt were then in the barn where Fitts lived. As to the other property, Fitts said he had none to deliver. Collins advertised said mare and colt for sale under said chattel mortgage, the date of said sale being February 13, 1891. On that day Collins adjourned the sale, but for what reason and to what time did not definitely appear.

Before the time arrived to which the sale had been adjourned, the defendant Miller, as deputy sheriff, had attached the same mare and colt on a writ in favor of one Keniston against the defendant Fitts, and on February 25, 1891, having meantime received an execution in said suit, the defendant Miller, as deputy sheriff, levied on the mare and colt in dispute, moved the same from the barn of the defendant, and immediately advertised them for sale upon said execution, according to law, but before the day of the sale said mare and colt were taken from his possession on the suit of replevin in this case.

At the time of the bringing of the replevin suit the defendant Fitts had no possession or control over the mare and colt.

J. K. Darling for the plaintiff.

Although the defendant Fitts was not in possession of the property at the time it was replevied, he is still a proper party, for he was the general owner of it. *Collomore v. Page*, 35 Vt. 391; *Fish v. Wallace*, 51 Vt. 418; *Farnham v. Chapman*, 60 Vt. 338.

John H. Watson and *A. M. Dickey* for the defendant.

Even though the mortgage should be held valid, the mare and colt were subject to attachment and sale on execution, and were, therefore, rightfully in the possession of defendant Miller. R. L., chap. 65; Acts of 1888, No. 69.

START, J. The plaintiff claims the property replevied under a chattel mortgage from defendant Fitts. Defendant Miller claims that, at the time the property was replevied, he had lawful possession of it for the purpose of a sale upon an execution against Fitts. It is found that defendant Miller, as deputy sheriff, took the property from the possession of defendant Fitts upon an execution against him and posted it for sale; and that, before the day of sale, it was taken from his possession upon the replevin writ in this case.

In order for the plaintiff to maintain its action of replevin, the burden was on it to show an unlawful taking or an unlawful detention of the property. R. L., s. 1230; *Deering & Co. v. Smith*, 66 Vt. 60. This it has not done. Upon the facts found we hold that defendant Miller lawfully took possession of the property, and that it does not appear that he unlawfully detained it; and it is found that defendant Fitts had no possession or control of the property at the time it was replevied.

R. L., s. 1180, authorizes the taking and sale of mortgaged personal property upon execution as the property of the mortgagor. R. L., s. 1181, provides that the officer taking such property on execution may demand of the mortgagee an account, in writing and under oath, of the amount due upon the debt secured by the mortgage; that the officer, without tender or payment of the amount due, may retain such property in his custody until such account is rendered; that the mortgagee, if he resides in this state, shall render such account within fifteen days after such demand; and that if he does not render such account, or if he renders a false account, such property may be sold discharged from such mortgage. R. L., s. 1182, provides that, if such debt is due at the time of rendering such account, the creditor taking such property in execution may, within ten days after the account is rendered, pay or tender the amount so rendered to the mortgagee, and sell the property discharged

from such mortgage. R. L., s. 1185, provides that, when the mortgage debt is not due at the time fixed for the sale, the creditor taking such property on execution may offer to pay the mortgage debt; and if the mortgagee refuse to receive the same, the property may be sold subject to such mortgage. No. 69, of the Acts of 1888, provides that when such account is rendered the property may be sold subject to the mortgage, whether the mortgage debt is due or not.

So far as appears from the report of the referee, all the steps taken by Miller with a view to sell the property upon execution were lawful, and such as he might and would naturally take were he proceeding to sell it under the enactments above cited. At the time the property was replevied, it was not too late to demand an account in writing and pay the mortgage debt, or sell the property subject to the mortgage. There is nothing in the case to show that defendant Miller was proceeding to sell the property without regarding the plaintiff's mortgage. So far as he has gone, he was proceeding as the statute authorizes. At the time the plaintiff replevied the property, it could not assume that Miller would not demand an account in writing of the sum due upon the mortgage debt and sell the property subject to its mortgage, nor that the creditor taking the property on execution would not pay the mortgage debt and sell the property discharged therefrom. For the purpose of selling the property in the manner authorized by the enactments above cited, Miller had a lawful right to take the property from the possession of the mortgagor and retain it, as against the mortgagee, for such time as was reasonably necessary to sell it in the manner provided for the sale of mortgaged personal property; and, it not appearing that he took or detained the property for any other purpose, or that there has been any unnecessary or unreasonable delay in the exercise of the

rights given by the enactments above cited, we hold that the defendants did not unlawfully take or unlawfully detain the property replevied.

The pro forma judgment is affirmed.

Thompson, J., being engaged in county court, did not sit.

H. L. CUTTING v. ESTATE OF J. W. ELLIS.

MAY TERM, 1894.

Appeal from probate court. Filing new counts in county court.

The claimant, upon appealing from the probate court, filed his declaration in assumpsit in that court. Subsequently he filed two additional counts in case in the county court. The defendant moved to dismiss these counts, and the court denied the motion. *Held*, no error; for

- (a) A party is not confined in the county court to his declaration filed in the probate court, but may file such additional counts as the nature of the claim demands; and
- (b) It may be that the counts were filed under No. 73, Acts of 1888, to cover claims not presented to the commissioners by reason of fraud, accident or mistake; and the court will not presume the contrary to find error.

Appeal from an order of the probate court for the district of Washington, disallowing the claim of the claimant. In the probate court the claimant filed a declaration in general

assumpsit. In the county court he amended this declaration by filing two additional counts in case. These counts the defendant moved to dismiss. Heard on this motion at the March term, 1894, Washington county, TYLER, J., presiding. Motion overruled. The defendant excepts.

Dillingham, Huse & Howland for the defendant.

The new counts being in tort, there is a misjoinder. *Williamson v. Allison*, 2 East 450; *Beeman v. Snow*, 27 Vt. 720; *Stewart v. Wilkins*, Doug. 18; 2 Chitty, Pl., 13 Am. Ed. *279, *280.

If the appellant desired to file separate counts in the county court, he should have done so in the probate court. *Adams' Admr. v. Sawyer's Est.*, 3 Vt. 373; R. L., ss. 2272, 2279; *Lynde v. Davenport*, 57 Vt. 597.

S. C. Shurtleff for the plaintiff.

There can be no misjoinder in suits for the prosecution of claims against the estates of deceased persons, for the statute provides that all sorts of causes of action can be joined. *Adams' Admr. v. Sawyer's Est.*, 3 Vt. 373; *Abbot v. Estate of Gale*, 11 Vt. 525.

START, J. This is an appeal from the disallowance of a claim by commissioners. In the probate court the plaintiff filed a declaration in general assumpsit. In the county court he filed two additional counts in case. The defendant moved that these additional counts be dismissed. The court overruled the motion, and the cause comes to this court for hearing upon the defendant's exception to this ruling.

The defendant's motion was properly overruled. In appeals from the allowance or disallowance of claims by commissioners, the claimant is required to file a declaration, and may join in his declaration as many counts as he has causes

of action. *Adams' Admr. v. Sawyer's Estate*, 3 Vt. 373; *Abbott v. Estate of Gale*, 11 Vt. 525. When a claimant appeals from the disallowance of his claim by commissioners, it is his duty to file his declaration in the probate court. R. L., s. 2272. If he omits to file a declaration in that court, he may, by leave of court, file it in the county court. *Francis v. Lathrope*, 2 Tyler 372. When a declaration filed in the probate court does not correctly set forth the claimant's claim, the county court may allow him to amend; and, for the purpose of setting forth his claim or claims in proper form, he may join the same counts and causes of action that he could have joined in his declaration filed in the probate court. R. L., s. 907; *Brown v. Brown*, 66 Vt.

The ruling of the court below can also be sustained under R. L., s. 2271, as amended by No. 78, of the Acts of 1888, which provides that, if any claim in favor of the estate against the claimant, or any claims in favor of the claimant against the estate, has not been presented to the commissioners by reason of fraud, accident or mistake, on trial, upon filing statements of claims in the county court, recovery may be had for such claims not presented to the commissioners. The causes of action declared on in the two additional counts in case may not have been presented to the commissioners by reason of fraud, accident or mistake. If this was so, the defendant had a right to file additional counts in the county court, setting forth the causes of action omitted in presenting his claim to the commissioners. We cannot, for the purpose of finding error in the ruling of the court below, assume that the plaintiff did not thus file his additional counts pursuant to the statute above cited.

Affirmed and remanded.

Thompson, J., being engaged in county court, did not sit.

M. M. TATRO v. W. S. BAILEY.

OCTOBER TERM, 1894.

Contract for service of stallion. Warranty Death of stallion. Parol evidence to vary written contract. Assumpsit.

1. The contract for the service of a horse being "\$75 to warrant. Mares must be returned regularly for trial," and it appearing that the plaintiff's mare had been regularly returned during the life of the defendant's horse, *held*, that the plaintiff could recover the amount paid for the original service, upon its appearing, after the death of the defendant's horse, that his mare was not with foal.
2. The fact that the plaintiff had, by the terms of the contract, the privilege of putting his mare to another horse of the defendant in the event of the death of the horse first used, did not compel him to do so.
3. Having elected to stand upon the written contract, the defendant cannot vary its terms by parol.
4. General assumpsit will lie to recover money paid upon a contract of warranty where the consideration has entirely failed.

General assumpsit. Plea, the general issue. Trial by jury at the June term, 1892, Caledonia county, THOMPSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

7. *P. Lamson* for the defendant.

General assumpsit will not lie. The plaintiff must prove

a warranty, and his declaration must state his case. *Camp v. Barker*, 21 Vt. 469; *Myrick v. Slason*, 19 Vt. 121; 1 Chitty, Pl., 14 Am. Ed., 355 and notes; *Londrignon v. Crowley*, 12 Conn. 563; *Miller v. Watson*, 4 Wend. 267.

W. P. Stafford for the plaintiff.

There was a total failure of consideration, and general assumpsit is the appropriate remedy. *Way v. Raymond*, 16 Vt. 371.

TAFT, J. The plaintiff seeks to recover the sum paid by him for the use of the defendant's horse "Cobden" in the season of 1890. A catalogue was in evidence containing the terms of a contract. There was evidence in the case tending to vary the terms of the catalogue contract, but when the testimony was closed the defendant claimed that the contract for the use of "Cobden" was "just such as was in the book," meaning the catalogue. He insisted that it was "essentially a contract in writing." When testifying he was asked, if in making the contract he "in any way deviated from the terms set forth in the catalogue," and he answered "I don't think I did. No, sir;" and he further testified that when a special trade was made for the use of "Cobden" it was always put in writing, and that no special trade was made with the plaintiff. The court held that the defendant might stand upon the contract stated in the catalogue. To determine the rights of the defendant under the contract it is necessary to refer to the catalogue; in it we find the contract set forth in these words, "Cobden \$50 the season; \$75 to warrant. Cash or approved note at time of service." The contract was not for the season, but was "\$75 to warrant," and that amount was paid in advance. The contract was for the season of 1890. In effect it was this: The defendant agreed that the plaintiff's mare should be with foal by Cobden during the season of 1890. A clause

in the contract reads "Mares must be returned regularly for trial." It was the duty of the plaintiff to return his mare regularly for trial, at suitable times, if in heat, that she might be served by Cobden. The testimony of the defendant shows that the mare was regularly returned so long as Cobden lived. The defendant contends that upon the death of Cobden it was the plaintiff's duty to return the mare to another of the defendant's horses, by force of a clause on page five of the catalogue which reads, "In case of the death or sale of either stallion, patrons of such horse may use any other horse by paying such difference in service fee as may exist." This clause did not bind the plaintiff to return his mare to any other of the defendant's horses. It was optional with him to do so; if he did not choose to avail himself of the privilege, he could stand upon the contract disregarding his right to return the mare to another horse. The plaintiff, therefore, fulfilled the contract on his part, by regularly returning the mare to Cobden so long as Cobden lived. He was under no duty to return her to another horse. It is urged on behalf of the defendant that his testimony tended to show that the warranty was nothing more than that the plaintiff had the right to return the mare to the defendant's horse in the season of 1891 if she did not become with foal in 1890. But the defendant chose to stand upon the contract as expressed in the catalogue, and it is not permissible for him now to insist upon any parol variation of it that his testimony might have tended to show. As we hold that under the contract the plaintiff was not bound to return his mare to any horse but Cobden, the death of the latter made it impossible for the defendant to perform his warranty. If the return privilege was a part of the contract, the defendant, Cobden being dead, could not perform on his part and as he had warranted the plaintiff a foal, and his contract having wholly failed, there was no consideration for his retaining the plaintiff's money. Nothing re-

mained for him to do but to pay over the money to the plaintiff. Under such circumstances general assumpsit was a proper action for the plaintiff to bring to recover the money he had paid the defendant.

Judgment affirmed.

MINNIE L. ADAMS, ADMX.,

v.

FITCHBURG RAILROAD CO.

MAY TERM, 1894.

Penal statute. Massachusetts act assessing damages for death from negligence of railroad corporation is.

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1. No action can be maintained in this jurisdiction upon the penal statute of another state.
 2. Chap. 112, sec. 212, Pub. St. Mass., providing that if a person is killed by the negligence of a railroad corporation in the operation of its railroad, it shall be liable in damages to the amount of not less than five hundred dollars nor more than five thousand dollars, to be assessed with reference to the culpability of the corporation, and to be recovered in an action by the administrator or executor of the deceased person for the benefit of the widow and next of kin, is penal.

Action on the case. Heard upon demurrer to the plaintiff's declaration, at the March term, 1894, Windham county,

Ross, C. J., presiding. Judgment sustaining the demurrer, and for the defendant. The plaintiff excepts.

The plaintiff brought suit as the administrator of one L. C. Adams, alleging that the defendant was a railroad corporation operating a railroad in the state of Massachusetts, and that her intestate, while a passenger upon said railroad in that state, had been killed by the negligence of the defendant, and without fault upon his part, and that she thereby became entitled to an action in virtue of chap. 112, s. 212, of the Public Statutes of Massachusetts, which she alleged was in substance as follows :

“If by reason of negligence or carelessness of a corporation operating a railroad or street railway, or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation is lost, the corporation shall be punished by fine of not less than five hundred dollars or more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties ; or if there are no children to the use of the widow, or if no widow to the use of the next of kin ; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation it shall also be liable in damages not exceeding five thousand dollars nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or its servants or agents, and to be recovered in an action of tort commenced within one year from the injury causing the death by the executor or administrator of the deceased person for the use of the persons hereinbefore specified in a case of indictment.”

Waterman, Martin & Hitt for the plaintiff.

The right of action in this case was transitory, and the

action might be maintained wherever jurisdiction of the defendant could be had. *Rofaal v. Verelst*, 2 W. Bl. 983, 1055; *Scott v. Seymour*, 1 H. & C. 219; *Madrazo v. Wilis*, 3 Barn. & Ad. 284; *Mostyn v. Fabrigas*, Coup. 161; *De la Vaga v. Vana*, 1 Barn. & Ad. 284.

Statutes of this kind can be enforced in any state whose policy is not opposed to a recovery of this sort. *Dennick v. Railroad Co.*, 103 U. S. 11; *Bissel v. Michigan Rd. Co.*, 22 N. Y. 258; *McCormick v. Penn. Rd. Co.*, 11 Hun. 182; *Stallknecht v. Penn. Rd. Co.*, 13 Hun. 451; *Great Western Ry. Co. v. Miller*, 19 Mich. 305; *Selnea, etc. Rd. Co. v. Lacy*, 43 Ga. 461.

The statute giving the right of action need not be the same in the state where the injury occurs and that where the suit is brought. It is enough if there is a statute in the state where the injury occurs giving compensatory damages and in the state where the suit is brought recognizing the same right. *Higgins v. Cen. New Eng. etc. Rd. Co.*, 155 Mass. 176; *Richardson v. New York Cen. Rd. Co.*, 98 Mass. 85; *Nelson, Admr., v. Chesapeake and Ohio Rd. Co.*, 54 Am. & Eng. R. R. Cas. 82.

Batchelder & Bates for the defendant.

The Massachusetts statute is plainly a penal one. The amount of recovery is in no case less than five hundred dollars, and anything in excess of that sum is made dependent upon the degree of culpability. The statute being penal, no action will lie in this jurisdiction. *Richardson, Admr., v. New York Cen. Rd. Co.*, 98 Mass. 85; *Halsey v. McLeon*, 94 Mass. 439; *Bettys v. Milwaukee & St. Paul Rd. Co.*, 37 Wis. 323; *Herrick v. Railroad Co.*, 11 Am. & Eng. Ry. Cas., 156; *Bank v. Price*, 3 Am. Rep. 204; *Lawyer v. Smith*, 1 Denio 207; *Davis v. Railroad Co.*, 43 Mass. 301; *Higgins v. Railroad Co.*, 155 Mass. 176; *Hubbell v.*

Gale, 3 Vt. 266; *Legallee v. Blaisdell*, 134 Mass. 473; *White v. Comstock*, 6 Vt. 405; *Keyes v. Prescott*, 32 Vt. 86; *Edwards v. Osgood*, 33 Vt. 224; *Ryker v. Hooper*, 35 Vt. 457.

MUNSON, J. The plaintiff claims to recover by virtue of the provisions of a public statute of Massachusetts. The suit cannot be maintained if the statute declared upon is held to be penal. *Blaine v. Curtis*, 59 Vt. 120. So far as we are informed by counsel or have been able to ascertain by examination, no construction has been placed upon this statute by the Massachusetts court. It thus becomes necessary for us to give to the statute our own interpretation. Its provisions are different from those of any other statute to which our attention has been called. It is not free from expressions which in themselves would characterize a statute as remedial rather than penal. The defendant is made liable in damages, and the ascertainment of the amount is characterized as an assessment. It is certain, however, that the designation of the recovery as damages or as a forfeiture is not conclusive as to the character of the statute. A statute giving a right of recovery is often penal as to one party and remedial as to the other. It is said that in such cases the true test is whether the main purpose of the statute is the giving of compensation for an injury sustained, or the infliction of a punishment upon the wrongdoer. We think an application of this test to the provision in question shows it to be penal. The foundation of the action is the loss of a life by reason of the defendant's negligence. There was no right of action at common law. This statute gives a right of action to the personal representative of the deceased, for the benefit of the widow and children, or widow, or next of kin. If the right of recovery is established, the damages are to be five hundred dollars in any event. Any recovery beyond

this is to be assessed with reference to the degree of the defendant's culpability. It appears, then, that whatever the damages may be, or whomsoever the person for whose benefit they are recovered, they are not given with reference to the loss sustained. If the recovery could be had only for the benefit of widow and children the statute might perhaps more easily be looked upon as remedial. But the recovery may be for the benefit of distant relatives who had no claim upon the deceased for support. And whether the recovery be for the benefit of widow and children or of distant relatives, the health or habits of the deceased may have been such as to preclude the existence of any appreciable pecuniary interest in the continuance of his life. All these matters which enter into the question of compensation are excluded from the inquiry. The wrongdoer is to be punished whether the person receiving the amount of the recovery has sustained a substantial injury or not. If the beneficiary has in fact received an injury, it is in no way made the basis of the recovery. The provision differs in this respect from those which give damages in excess of the injury received. Statutes giving double damages to an aggrieved party are held not to be penal. *Burnett v. Ward*, 42 Vt. 80; *Reed v. Northfield*, 13 Pick. 94. But in such cases there is an ascertainment of the actual damages, and that ascertainment is the basis of the entire recovery. Here there is no ascertainment of the loss suffered, and as far as the amount of the verdict is left to the judgment of the jury, it is to be determined by the culpability of the defendant's act, regardless of the injury resulting from it to the persons for whose benefit the suit is brought. It is true that in *Newman, Treas., v. Waite*, 43 Vt. 587, an amount given without any reference to the damage sustained was held to be given by way of compensation. But in that case, if the statute had merely created the duty of making the returns, the common law would have enabled the town to recover its actual damages

for a failure to do so; and it was taken to have been the purpose of the Legislature in its further provision to give a certain sum as fixed damages in lieu of actual damages otherwise recoverable which might not be easily ascertained. But that reasoning is not available here; for in this case the existence of the obligation to carry the deceased with due care did not give these beneficiaries a right to any damages whatever for the neglect complained of. And it is to be noticed that the giving of a fixed sum excludes a consideration of the degree of culpability as well as of the loss sustained. We think the rule given for determining the unascertained part of the recovery is the controlling feature of the statute. It is difficult to say that an assessment which is made to depend solely upon the degree of the party's culpability is not primarily meted out as a punishment. The sum is to be determined by the very considerations that would govern a court in fixing a fine for involuntary manslaughter. The fact that it is given to persons whom the law would have entitled to share in the estate of the deceased cannot control the construction. A statute may be penal, although the entire amount recovered be given directly to the party injured. The disposition of the recovery, and the limitations of the amount recoverable, are the same in the clause declared upon as in the provision for an alternative procedure by indictment contained in the same section. The provision which is clearly penal serves the same purpose as regards compensation, and has no greater effect as regards punishment. In view of these considerations, and in the absence of knowledge of a construction by the Massachusetts court, we hold that the provision sued upon is penal.

Judgment affirmed and cause remanded.

Start, J., was absent in county court.

ELEANOR SHEERAN v. CALEB M. ROCKWOOD.

MAY TERM, 1894.

Justice ejectment.

A certified execution may issue to enforce a judgment for rent recovered in an action of justice ejectment.

Justice ejectment. Plea, the general issue. Trial by court at the September term, 1894, Chittenden county, TAFT, J., presiding. Judgment that the plaintiff is entitled to the seizen and possession of the premises sued for, and that he recover the sum of eighty-two dollars and sixty-two cents rent and costs. The plaintiff moved for a certified execution, which was granted. To the action of the court in this last particular the defendant excepted.

M. H. Alexander and *A. V. Spaulding* for the defendant.

The payment of this rent was a matter of contract, and a certified execution cannot be used to enforce the non-performance of a contract. R. L., ss. 1321, 1326; *Hill v. Cox*, 54 Vt. 627; *Melendy v. Spaulding*, 54 Vt. 517; *Whiting v. Dow*, 42 Vt. 262; *Soule v. Austin*, 35 Vt. 515; *Pilkin v. Burch*, 48 Vt. 521.

D. J. Foster for the plaintiff.

START, J. The court below adjudged that the cause of

action arose from the wilful and malicious act and neglect of the defendant, and that he ought to be confined in close jail. The defendant insists that the action is founded on contract, and that the court had no authority to grant a close jail execution.

If the action is one in which a close jail execution could be properly granted, and the evidence tended to show that the cause of action arose from the wilful and malicious act or neglect of the defendant, the finding of the court below, that the cause of action arose from the wilful and malicious act and neglect of the defendant, is conclusive. *Melendy v. Spaulding*, 54 Vt. 517; *Robinson v. Wilson*, 22 Vt. 35; *Whiting v. Dow*, 42 Vt. 262; *Soule v. Austin*, 35 Vt. 515. The evidence is not referred to, and the only question we have to determine is whether the cause of action is such that a close jail execution could properly be granted.

The action is founded on the wrongful withholding of the plaintiff's premises by the defendant, and is brought under R. L., s. 1321. It is in the nature of an action of ejectment, and must be regarded as an action founded on tort. *Barnes v. Tenny*, 52 Vt. 557. In actions founded on tort, the court, from a consideration of the facts, may adjudge that the cause of action arose from the wilful and malicious act or neglect of the defendant, and that he ought to be confined in close jail. R. L., s. 1502. The lease under which the defendant went into the possession of the premises terminated before February 7, 1893, by a breach of the conditions thereof by the defendant, and he thereafter continued in possession without right. He thereafter wrongfully withheld the possession of the premises from the plaintiff, and the court has, in effect, found that he wilfully and maliciously withheld such possession. The defendant having wilfully and maliciously withheld the possession of the premises from the plaintiff, she was under the necessity of bringing this action; and her cause of action arose from the wilful and

malicious act of the defendant. It has been repeatedly held in this state, in actions of tort, that a close jail execution may properly be granted, when the defendant has wilfully and maliciously withheld the possession of personal property from the party entitled to it. There is no reason for a different holding, in actions of tort, when it appears that the defendant has wilfully and maliciously withheld the possession of real estate from the plaintiff.

The statute under which this action is brought does not authorize the bringing of the action for the non-payment of rent alone. To maintain the action there must have been a holding of the possession of real estate by the defendant without right, after the termination of the lease by its own limitation, or after a breach of a stipulation contained therein; and the recovery in such case is the possession of the premises, and, as an incident to such recovery, rent may be recovered. R. L., s. 1324; *Barnes v. Tenny, supra*. The judgment below was for the possession of the premises and the rent that accrued while the defendant wilfully and maliciously withheld the possession thereof. No exception was taken to the entry of this judgment, and the question of whether rent which accrued while the defendant held possession wrongfully and without right can be recovered in this action, is not before us. The rent for which the court below rendered judgment was rent or damage that accrued to the plaintiff by reason of the defendant's wilfully and maliciously withholding from her the possession of her property, after his right thereto had terminated; and, the court having found that the defendant's act in this respect was wilful and malicious, it properly granted a close jail execution. The lease, in connection with the other evidence in the case, was admissible.

Judgment affirmed.

Thompson, J., being engaged in county court, did not sit.

TOWN OF JERICO v. TOWN OF UNDERHILL.

OCTOBER TERM, 1894.

Judgment. When not conclusive in other suit.

A judgment in chief for the plaintiff, following the finding of an issue of fact raised by the defendant's plea in abatement in favor of the plaintiff, is in the nature of a penalty upon the defendant, and does not conclusively establish a right of recovery upon the merits in another suit between the same parties.

Assumpsit for the support of a pauper. Plea, the general issue. Trial by jury at the April term, 1894, Chittenden county, ROWELL, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

J. J. Monahan, W. P. Dillingham, and S. C. Shurtleff for the defendant.

The record of a former judgment is only conclusive as to the facts which were actually litigated in the former suit. *Outram v. Morewood*, 6 East 346; *Gardner v. Buchbee*, 3 Cow. 120; *Howlett v. Tarte*, 10 C. B., N. S., 813; *Boileau v. Ratlin*, 2 Exch. 665, 681; *Hughes v. Alexander*, 5 Duer 493; *Steam Packet Co. v. Sickles*, 24 How. 333; *Russell v. Place*, 4 Otto 606; *Cromwell v. County of Sac*, 4 Otto 351; *Aiken et al. v. Peck*, 22 Vt. 255; *Dunklee v. Goodenough*, 63 Vt. 459; *Town v. Lamphere*, 34 Vt. 365.

Hard & Bliss for the plaintiff.

The right of recovery in the plaintiff is *res judicata*. *Jericho v. Underhill*, 64 Vt. 362; *Underhill v. Jericho*, 66 Vt. 183; Gould, Pl., p. 152, ss. 167-169, 300; *Eichorn v. Le'Maitre*, Wilson 367; *Tompson v. Collier*, Yelverton, 112; *M'Cartee v. Chambers*, 6 Wend. 649; *Peach v. Mills*, 13 Vt. 501; *Vanderburg v. Clark*, 22 Vt. 185; 1 Chitty, Pl., 481; *Bonner v. Hall*, 1 Ld. Ray. 339; *Crosse v. Bilson*, 2 Ld. Ray. 1016, 1022; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Plummer v. Dodge*, 3 N. H. 323.

TYLER, J. Assumpsit to recover for the support of a pauper from February 7, 1891, to November 22, 1892.

A former suit had been brought before a justice of the peace to recover for the support of the same pauper for a period prior to that for which a recovery is sought in this action. The defendant filed a dilatory plea averring that the justice, by reason of interest, was disqualified from trying the suit. The justice decided that he was qualified, and rendered judgment for the plaintiff for its damages and costs. The defendant appealed, and the county court heard the cause upon the defendant's plea, the replication thereto traversing the plea and facts found upon the issue joined, and rendered judgment *pro forma*, dismissing the cause for want of jurisdiction in the justice. The cause passed on exceptions to the supreme court, which reversed the judgment, rendered judgment for the plaintiff, and remanded the cause to the county court for the assessment of damages, holding that that court should have rendered judgment in chief for the plaintiff and assessed the damages. 64 Vt. 362. After the return of the cause to the county court, pursuant to a stipulation of the parties, the judgment of the justice was affirmed.

To establish its right of recovery in this action the plaintiff introduced in evidence a certified copy of the record in the former suit. The usual judgment was rendered therein

which, by the rules of pleading, follows the trial of an issue of fact upon a plea in abatement when the issue is determined in favor of the plaintiff.

“If it (the plea) be to the person, or action, or jurisdiction, and is found for the demandant or plaintiff, he shall recover the thing in demand.” 1 Viner’s Abr., tit. Abatement, L. b.

“It is well settled that if issue be taken upon a plea in abatement, and the jury find for the plaintiff, they must assess the damages in the same manner as when issue is found for the plaintiff upon a plea in bar.” *Dodge v. Morse*, 3 N. H. 232 and cases cited.

Though a plea to the jurisdiction is not properly a plea in abatement, it is a dilatory plea, and the consequence of pleading it is the same as in a plea in abatement. 7 Bacon’s Abr., tit. Pleas and Pleading, E, 2; Gould’s Pl., chap. 5, pl. 2.

This rule, which is as ancient as the common law, is still maintained wherever the common law prevails. It was recognized in this court in the case above cited. A reason given for this peremptory judgment is, that the defendant choosing to put the whole weight of his cause on this issue when he might have had a plea in chief, it is an admission that he had no other defence. 1 Bacon’s Abr., tit. Abatement, P. 1 Chitty on Pl., 458, gives as a reason that the plea is found to be untrue. Other writers say that the judgment is not peremptory on *demurrer*, because the party is not supposed to be conusant of the matter in law, while he is supposed to be conusant of the matter in fact by him pleaded. Viner, *supra*, note. In *Eichorn v. Le’Maitre*, 2 Wil. 367, it is said that “wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false; but upon a demurrer to a plea in abatement there shall be a *respondeat*

ouster, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court." Stephen on Pleading, 104.

The rule takes no cognizance of the fact that the defendant may have had, or in good faith believed he had good ground for his dilatory plea, and yet have been unable to maintain it. It does not leave the matter with the court to consider and decide whether the plea was filed for the purpose of delay, or in good faith, and then render final judgment against the defendant, or permit him to answer over, as it may do upon demurrer. The judgment is retributive, and damages are assessed without reference to the merits of the plaintiff's cause of action.

This severe rule doubtless had its origin in the fact that dilatory pleas were once used for the mere purpose of delay, and to such an extent that statutes 4 and 5 Ann, c. 16, were enacted, by which no such plea could be admitted without affidavit of its truth, or some probable matter shown to the court to induce it to believe it true. 3 Black. Com. 304.

But the penalty ought to be proportionate to the evil which it was designed to remedy. Formerly, in England, when the plaintiff failed to obtain judgment in a case tried upon its *merits*, upon a plea in *bar*, the defendant not only recovered his costs, but the plaintiff was amerced, fined, for prosecuting a false claim; and when judgment was for the plaintiff, the defendant was likewise *in misericordia domini regis pro falso clamore*, and fined for his delay of justice. Stephen on Pl. 109. Under that rule failure of success by a party litigant amounted to a misdemeanor.

As the judgment upon a plea in abatement, when the issue of fact is decided for the plaintiff, is in chief against the defendant and in the nature of punishment for delay, its operation ought to be limited to the plaintiff's claim in that case.

In the present case the main questions, whether the pauper was chargeable upon Underhill and was transient in Jericho,

were not adjudicated or considered in the former suit, and yet it is contended that the judgment in that suit is conclusive of those facts. We think it cannot in justice be so held. The true rule is that laid down in *Russell v. Place*, 4 Otto, 606:

“That a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.”

To the same effect are other cases cited in the defendant's brief.

As the former case was not tried on its merits, the adjudication therein is not a bar to a recovery in the present one. In this view the other point made by the defendant becomes unimportant.

Judgment reversed and cause remanded.

J. W. MACK, ADMR., v. WALTER DAILEY, APT.

GENERAL TERM, 1893.

Lease. Payment of rent. Condition that lessee may purchase. Ejectment.

1. Plaintiff leased defendant certain premises for a given term at a stipulated rent, payable monthly. The lease contained a proviso that the defendant might, at the expiration of the term, having kept all the conditions of the lease, purchase the premises if he so elected. *Held*, that if the plaintiff had received all the rent he could not refuse to convey, because it had not always been paid when due.
2. The language of the lease was that the defendant might purchase at "the option of the parties." *Held*, that this meant at the option of the defendant.
3. The defendant, having performed all the conditions of the lease, elected to purchase, and so notified the plaintiff, who thereupon refused to convey and brought suit in ejectment under R. L., s. 1321. *Held*, that that action would not lie, for the plaintiff was no longer a lessor, but a vendor.

Justice ejectment. Plea, the general issue. Trial by court at the September term, 1892, Washington county, Ross, C. J., presiding. Upon the facts found judgment was given for the defendant. The plaintiff excepts.

The plaintiff, as the administrator of one Jackson, leased to the defendant certain premises in the town of Woodbury for a term commencing June 1, 1891, and extending to November 1, 1891, for a rent of ten dollars per month, payable monthly, and whatever taxes might be assessed against said

premises for that year. The lease provided that if the defendant kept and performed all its conditions up to the end of the term, he might occupy the premises without further consideration until the first of April, 1892; and that the defendant might purchase said premises, "at the option of the parties," and if he so elected before said April 1, what rent he had paid to be applied upon the purchase price.

The defendant entered into the occupancy of the premises under this lease and contract, and continued to occupy the same. He paid the rent and taxes, but did not always pay the rent when due, although it was received by plaintiff without objection. Subsequently to November 1, he seasonably notified the plaintiff that he elected to purchase the premises; whereupon the plaintiff notified him that he should not convey said premises, and soon after brought this suit in ejectment.

B. E. Bullard for the plaintiff.

Ejectment is the proper remedy. R. L., s. 1321; *Horan v. Thomas*, 60 Vt. 325.

T. J. Deavitt for the defendant.

The defendant having duly elected to purchase the premises, was entitled to their possession. Hence ejectment will not lie. R. L., ss. 1324, 1325.

MUNSON, J. The defendant did not always pay the monthly rent on the day it became due, but the plaintiff accepted it when paid without objection. This acceptance was a waiver of the right to treat the failure to pay when due as a breach of the stipulation. Having thus performed his stipulations as lessee, the defendant was entitled to the benefit of the agreement to sell. The provision that the lessee may buy at the option of the parties clearly means at

his own option, and would add nothing to the contract unless so construed. The defendant seasonably made known to the plaintiff his election to take the premises as purchaser. So the holding complained of was not against the plaintiff as lessor, but against him as vendor. The question being one between vendor and purchaser, this remedy is not available. *Davis v. Hemenway*, 27 Vt. 589; *Pitkin v. Burch*, 48 Vt. 521. It is not necessary to consider how the plaintiff's obligation to convey may be affected by the proviso contained in the agreement to sell. The defendant cannot be compelled to litigate his rights under that agreement in this proceeding.

Judgment affirmed.

L. W. CRAIG v. EUGENE GUNN AND TRUSTEE.

OCTOBER TERM, 1894.

Non-resident railroad corporation cannot be charged as trustee.

A railroad corporation chartered by and organized under the laws of another state and having its principal place of business in that state, but operating lines of railway in this state, can not be charged here as trustee. So held in respect of a debt due the principal defendant as wages for services rendered wholly in the state of New York and payable there.

Exceptions from the city court of Rutland. Assumpsit

by trustee process, in which the Delaware & Hudson Canal Co. was summoned as trustee. The defendant was defaulted. The trustee moved that it be discharged for want of jurisdiction. This motion was overruled, and judgment was rendered against both the principal defendant and trustee. The trustee excepts.

The plaintiff is a citizen of Colorado and the defendant of New York. The contract was made in Colorado. The trustee is chartered and organized under the laws of New York, and has its principal offices and places of business in that state, but operates a line of railroad in Vermont. The debt due the defendant was for wages as a fireman for services rendered wholly in New York upon a contract made there, and payable there.

Butler & Moloney for the trustee.

The court had no jurisdiction of the trustee. *Towle v. Wilder & Tr.*, 57 Vt. 622; *Wells v. E. Tenn, etc., Rd. Co.*, 74 Ga. 548; *Lingley v. Bateman*, 10 Mass. 343; *Ray v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Spuair v. Shea*, 26 Ohio St. 345; *Baxter v. Vincent*, 6 Vt. 621; *Rinage v. Green*, 52 Vt. 204.

J. A. Merrill, for the plaintiff, cited *Nichols v. Hooper*, 61 Vt. 295.

TYLER, J. The principal parties were non-residents, and the trustee was a foreign corporation having its principal office and place of business in the city of New York, but operating lines of railroad extending from points in the state of New York to the city of Rutland in this state. It also owned and operated various lines of railroad situated wholly in the state of New York. The contract upon which the suit was brought was made in another state, and the sums

due from the trustee to the defendant were wages for services rendered by the defendant for the trustee upon a line of railroad lying wholly in the state of New York, under a contract of employment made in that state, and there payable.

Corporations are amenable to the trustee process like private persons, but this mode of attaching the personal property of a debtor in the hands of a third person is conferred only by statute; and s. 1073, R. L., provides that no person shall be summoned as a trustee unless at the time of the service of the writ he resides in this state. Citizens of another state, and subject to its laws and jurisdiction, are not within the jurisdiction of the courts of this state, and the "credits" in their hands have no *situs* here, and are no more attachable by this process than are the goods of a debtor situated in another state. *Baxter v. Vincent*, 6 Vt. 614; *Pecks & Co. v. Barnum & Tr.*, 24 Vt. 75; *Rindge v. Green*, 52 Vt. 204.

In *Nichols v. Hooper et al.*, 61 Vt. 295, the plaintiff and defendant resided in New York, and the debt that the plaintiff sought to recover and the one due the defendant from the trustee were contracted, and in law were payable, in that state. The trustee resided in this state and was held liable, so that case is decisive of every question that arises in the present one excepting the question of jurisdiction over the trustee upon the facts stated.

Gold et al. v. Housatonic R. Co., 1 Gray 424, arose under a statute like our R. L., s. 1072. The opinion of Shaw, C. J., is as follows:

"It is agreed that the defendants have leases of railroads in this county, and this would make a strong case for charging them as trustees, if they could be chargeable as such under any circumstances. But the case of *Danforth v. Penny*, 3 Met. 564, is decisive, and shows that a foreign corporation cannot be so charged. By Rev. Sts., c. 109, s. 6, 'all corporations may be summoned as trustees.' But

what corporations? The very generality of the terms requires some qualification. It cannot be construed literally all corporations, in whatever part of the world established and transacting business. The answer is to be found in the statutes in *pari materia* then existing. The statute in question was only an extension of an existing system. It was intended, we think, to put corporations on the same ground as individuals. And it is well settled that an individual, an inhabitant of another state, is not chargeable by the trustee process, although found in this commonwealth and here served with process. *Tingley v. Bateman*, 10 Mass. 343; *Nye v. Liscombe*, 21 Pick. 263. In the case of corporations, which have no local habitation, the principle is this: If established in this commonwealth by the laws thereof, they are inhabitants of this commonwealth within the meaning of the law; but if established only by the laws of another state, they are foreign corporations, and cannot be charged by the trustee process."

This was the construction given a statute which contained no provision like our section 1073, that non-residents should not be subject to the trustee process. In 1870 the statute was amended so that non-residents, and corporations established by the laws of another state, might be summoned as trustees if they had a usual place of business in Massachusetts. In *Larkin v. Wilson*, 106 Mass. 129, the writ was served before the amendment to the former act was in force, and the court for that reason refused to hold a foreign corporation liable to the trustee process, and cited *Danforth v. Penny*, and *Gold v. R. Co.*, *supra*, in support of the position that such a corporation was not liable to be summoned as a trustee, though it was the lessee of a railroad in that state, and its principal officers resided there and agents were employed there to manage the road.

In the later case of *Bank of Commerce v. Huntington*, 129 Mass. 444, it was held that a railroad corporation, created by the laws of another state, and having an office in Massachusetts for the convenience of its stockholders and for the better management of its finances and other business,

where its principal officers were to be found, and where it carried on such business as is usually carried on in the office of the president and treasurer of a railroad corporation, had a usual place of business in that state within the meaning of the act of 1870, and might be summoned as trustee.

We have no statute like the Massachusetts Act of 1870, and even under that act this trustee process could not be maintained; for though it is presumable that the trustee had depots, freight houses, and agents in this state, it did not appear that it had any such office here as is described in the Massachusetts Act.

Drake on Attachment, s. 474, says:

"In this country the question has been repeatedly presented, and the uniform tenor of the adjudications establishes the doctrine that whether the defendant reside or not in the state in which the attachment is obtained, a non-resident cannot be subjected to garnishment there, unless, when garnished, he have in that state property of the defendant in his hands, or be bound to pay the defendant money, or to deliver to him goods, at some particular place in that state."

It was said in *Smith v. Insurance Co.*, 14 Allen 339:

"A corporation being a mere creature of local statutes, can of right have no existence nor recognition beyond the limits of the state wherein it is established. By comity such artificial persons are permitted to contract and sue in other states. If they avail themselves of that comity * * * they may become liable to its jurisdiction to the extent to which they have thus voluntarily subjected themselves."

This court held in *Osborne & Woodbury v. Shawmut Ins. Co.*, 51 Vt. 278, that the defendant corporation was to be treated as a citizen of the state in which it was incorporated, and there being no attachment of property, jurisdiction could only be obtained by service of the writ upon the insurance commissioners of this state, and by a compliance by the defendant corporation with the statute which requires foreign insurance companies to agree that they may

be sued in this state, which, as the court said in the case last cited, "is equivalent to an agreement that they may be *found* here for the service of process."

The debt due from the trustee to the defendant of course had no *situs* in this state unless the trustee resided here within the meaning of our statute. It cannot be maintained that it did reside here. We find no occasion to depart from the decision in *Towle v. Wilder & Tr.*, 57 Vt. 622, though no opinion was written in that case.

Judgment reversed, trustee discharged, and action dismissed.

TOWN OF WOODSTOCK v. TOWN OF BARNARD.

OCTOBER TERM, 1894.

Pauper. No recovery for aid furnished before notice.

1. Under No. 55, Acts of 1892, that town in which a pauper has his legal residence, whenever acquired, is liable to a town in which he is transient for his support.
2. But no recovery can be had for aid furnished before the giving of the notice required by said act to the overseer of the town sought to be charged.

Assumpsit for the support of a pauper. Heard upon an agreed statement of facts at the May term, 1894, Windsor county, THOMPSON, J., presiding. Judgment for the defendant. The plaintiff excepts.

The pauper was arrested on civil process March 12, 1892, and committed to jail in plaintiff town, where he remained until December 9, 1892. The support sued for was furnished between these dates. No notice was given by the overseer of the plaintiff to the overseer of the defendant until February 24, 1893.

The pauper had acquired a three years' residence in Barnard previously to 1874. Since that time he had not resided continuously in any one town for three years. When arrested he was temporarily in the town of Weathersfield.

French & Southgate for the plaintiff.

The pauper had a legal residence in the defendant town, and was transient in the plaintiff. Therefore, the plaintiff can recover. No. 55, Acts of 1892.

W. E. Johnson for the defendant.

The pauper did not "reside" in the defendant town within the meaning of the pauper acts. *Leicester v. Brandon*, 65 Vt. 544.

TAFT, J. I. No question is made but that the pauper for whose support this suit was brought was transient in the plaintiff town, nor that the defendant town was the one where he had last resided for the space of three years, supporting himself and family. The defendant, therefore, was chargeable with the support of the pauper. No. 55, Acts 1892.

II. A town chargeable with the support of a pauper is not liable under said act, if it provides for the pauper after the notice required by such act is given, for the statute reads that no action brought to recover the assistance given the pauper "shall be commenced," etc., until notice is given the overseer of the poor of the town chargeable with the pauper's support, and until the latter "has neglected to provide

for such person or family for sixty days after such notice." No recovery can be had unless the overseer of the town chargeable neglects to provide for the pauper for sixty days after notice. We think it clear from this that no recovery can be had for assistance rendered prior to the notice.

Judgment below was correct, and the same is affirmed.

LEWIS AND GEORGIA DICKERMAN

v.

VT. MUT. FIRE INS. CO.

SAME v. UNION MUTUAL FIRE INS. CO.

OCTOBER TERM, 1894.

Fire insurance. Allegation of insurable interest.

1. A declaration upon a policy of fire insurance must allege an insurable interest in the plaintiff both at the time of the issuing of the policy and the happening of the loss.
2. *Quere*, Whether this declaration sufficiently alleges that the loss was payable before the suit was begun.

Assumpsit upon a policy of fire insurance. Heard upon demurrer at the May term, 1894, Washington county, THOMPSON, J., presiding. Demurrer overruled and declaration adjudged sufficient. The defendant excepts. Exceptions passed to supreme court before trial.

Senter & Kemp and Dillingham, Huse & Howland for the defendant.

The declaration must aver an insurable interest. *Quarrier v. Peabody Life Ins. Co.*, 10 W. Va. 507; *Royal Ins. Co. v. Horton*, 14 Ins. L. J. 871 (Ky.); *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Home Ins. Co. v. Duke*, 75 Ind. 535; *Ætna Ins. Co. v. Kettles*, 81 Ind. 96.

There is no allegation that proofs of loss have been made, and therefore it does not appear that the money is due. 2 Wood, *Fire Ins.*, 1137 *et seq.*; *Donahue v. Windsor Co. Mut. Ins. Co.*, 56 Vt. 374.

D. C. Denison & Son and W. E. Johnson for the plaintiff.

The count is sufficient. *Tripp & Bailey v. Vt. L. Ins. Co.*, 55 Vt. 100.

· ROWELL, J. The question in these cases being the same, they were heard together.

The statement in the counts demurred to, that the policies and applications are referred to and made a part thereof, does not, as is conceded, make those instruments a part of the counts.

It is essential to the sufficiency of the counts that they should allege an insurable interest in the plaintiffs at the time the policies were issued and also at the time of loss.

In respect to the time of issuing the policies, it is alleged that the defendants promised the plaintiffs to pay them certain sums of money named if *their* buildings, situate, etc., were destroyed by fire between certain dates. It is doubtful whether this is a sufficiently definite and positive allegation of insurable interest. The authorities differ about it, and it is not necessary to decide the question, for the counts are

bad for not alleging such interest at the time of loss, concerning which they contain no allegation whatever.

It is also doubtful, to say the least, whether it appears from either count that the money was due and payable when the suits were commenced. It is true that the promises as laid are, to pay if the buildings were destroyed, but it is not alleged that payment was to be made on the happening of that event, nor on notice of its happening, nor within a reasonable or other time thereafter, and one of the counts alleges no notice. But it is unnecessary to consider this point further, as the pleader can easily obviate this objection when he repleads.

Judgment reversed, demurrers sustained, the counts adjudged insufficient, and causes remanded.

Taft, J., being a member of one of the companies, did not sit.

LEANDER C. CARPENTER v. ALMENA P. COOK.

OCTOBER TERM, 1894.

Plea to action of trespass. Pent road not a highway within statute as to fences.

1. A plea to an action for trespass by cattle which alleges that the animals escaped into the plaintiff's close through a gate in the division fence between the plaintiff and defendant, which was sufficient to stop cattle, and which the plaintiff had for many years maintained for that purpose, but which upon the occasion in question he had torn down, and through which the cattle had thereby escaped into the plaintiff's close, is good, although it does not show that the plaintiff was under any legal obligation to maintain the gate.
2. The statutory provision that the owners of lands bordering upon highways need not fence the same along such highway does not apply to pent roads.

Trespass *quare clausum*. Heard at the June term, 1894, Orange county, Ross, C. J., presiding, upon demurrer to the defendant's rejoinder. Adjudged that the plaintiff's replication is insufficient. The plaintiff excepts. Exceptions passed to supreme court before final judgment.

John W. Watson for the plaintiff.

At common law the owner of cattle must restrain them from running at large. *Hurd v. Rut. & Bur. Rd. Co.*, 25 Vt. 109, 122; *Holladay v. Marsh*, 3 Wend. 142; *The Townawando Rd. Co. v. Munger*, 5 Denio 255; *Kecnan et ux. v. Cavanaugh*, 44 Vt. 268.

Neither was the owner bound to fence against a highway. *Holden v. Shattuck*, 34 Vt. 336, 343; *Hurd v. Rut & Bur. Rd. Co.*, 25 Vt. 109; *Woolson v. Northern Rd. Co.*, 19 N. H. 267, 269.

A pent road is a highway. R. S. 124, ss. 3, 5; Gen. S., chap. 24, s. 15; R. L., s. 2914; *Wolcott v. Whitcomb*, 40 Vt. 40.

The plea does not set up a prescriptive obligation on the defendant to maintain the gate. Co. Litt., 304; Gould's Pl., chap. 8, ss. 65-72, 78; 7 Bac. Abr., 651; *Stearns v. Patterson*, 14 Johns. 132.

Smith & Sloane for the defendant.

A division fence along a pent road must be maintained. The statute as to highways does not embrace pent roads. *Wolcott v. Whitcomb*, 40 Vt. 40.

ROWELL, J. This is an action of trespass to land with cattle. The question arises on demurrer to the rejoinder to the replication to the third plea. Said plea alleges that the defendant had a close adjoining the plaintiff's close in which, etc., and that for more than fifteen years before the commencement of this suit a fence had been maintained between said closes, and that for a like space of time a gateway and a gate had been maintained for the plaintiff's convenience through said fence to his dooryard, which said gate had all that time been built, maintained, and kept in repair by the plaintiff and the other owners and occupants of his said close, and that said gate, being a good and sufficient gate to stop cattle, was left open, torn down, and carried away by the plaintiff, whereby and by means whereof the cattle in the declaration mentioned, at the said several times when, etc., then lawfully feeding and depasturing in the defendant's said close, without the knowledge and against the will of the defendant, erred and escaped thereout into the plain-

tiff's said close through the defects and insufficiency of said gate so left open and destroyed by the negligence of the plaintiff, and committed, if at all, the trespasses complained of.

The replication alleges that before and at the said several times when, etc., there was a public highway between said closes, and that the plaintiff's dooryard was contiguous thereto; that said gateway was in said fence between said dooryard and said highway and on the side of said highway, and led from said dooryard into said highway; that before and at the said several times when, etc., in said plea mentioned, no gate had been there maintained nor kept in repair nor closed, and that along and upon the side of said highway contiguous to the defendant's close, the defendant did not at the said several times when, etc., keep, maintain, nor have a fence sufficient to stop cattle that were feeding and depasturing therein from escaping therefrom into and upon said highway; and that at the said several times when, etc., said cattle did stray from the defendant's close into and upon said highway and thence into the plaintiff's close, and there committed the trespasses complained of.

The rejoinder alleges that if there is a public highway there as replied it is only a pent road, and wholly on the defendant's close, and if any part of it is contiguous to the plaintiff's close, it is necessary for the protection of the defendant's close and crops therein to have a suitable fence between the plaintiff's close and the defendant's close and said pent road, and if it is necessary that a gate should be maintained for the convenience of the plaintiff in getting from his dooryard to said road, it is equally necessary and reasonable that said gate should be kept closed for the protection of the defendant's close and crops therein; that for more than fifteen years before the commencement of this suit, said gate and fence had been so kept and maintained in a good and sufficient manner on the line between the plaintiff's close

and the defendant's close by the recognition and acquiescence of the owners of both closes, and of right ought to be maintained for the protection of the defendant's close and crops, and that at the said several times when, etc., it was the duty of the plaintiff to keep said gate closed, and if any trespass was committed as alleged, it was by reason of the plaintiff's neglect and refusal to keep said gate closed or to allow it to be maintained and by reason of his tearing down a sufficient gate that had been kept and maintained as aforesaid.

The causes of demurrer assigned are, that the rejoinder is argumentative, double, and hypothetical. It is also claimed that it departs from the plea, and that this objection can be taken advantage of under the general demurrer.

The plaintiff attacks the plea as bad in substance, for that it does not show a prescriptive nor other obligation on him to keep and maintain said gate. But if this is so, the fact that there was a gate there in the division fence that the plaintiff and those under whom he claims had kept and maintained for the purpose and in the manner alleged, which was sufficient to stop cattle, and which he tore down, and through which, by reason thereof, the cattle escaped into his close and did the damage complained of, makes the plea good, regardless of whether he was bound or not to maintain the gate, for thereby, in the circumstances disclosed in the plea, he became and was a wrongdoer, and the author of his injury, and therefore cannot be heard to complain.

The next question is whether the replication is good in substance. The public highway mentioned therein is not alleged to be an open highway, and as everything is to be taken most strongly against the pleader, it must be taken to be a pent highway, which fulfils the allegation. It is conceded that the replication is bad if pent roads do not stand like open highways in the law of fences.

The statute provides that owners or occupants of adjoining lands, when the lands of both parties are occupied, shall

make and maintain equal portions of the division fence between their respective lands; but that the owners of lands are not bound to make and maintain fences on the sides of highways; and that occupied land bordering upon highways shall be deemed the enclosure of the owner or occupant. R. L. 3178, 3179. It also provides that when the lands of two or more individuals are so situated that either is not compelled to make and maintain a fence on the dividing line between their lands by reason of highways lying between, each owner or keeper shall be liable for the damage done on the occupied lands of others by an animal straying from his lands and being taken on such occupied lands. R. L. 3183. Concerning pent roads it provides that the selectmen may allow them to be enclosed and occupied by the owner of the land during any part of the year, and bars and gates, in such places as they designate, to be erected thereon; and persons wilfully removing any such bars or gates, thereby exposing the lands or crops of any person to damage, are subjected to a penalty. R. L. 3004, 3005. In *Walcott v. Whitcomb*, 40 Vt. 40, it was held that in the absence of regulations by the selectmen upon the subject, the owner of the land has a right to erect bars and gates on a pent road for the protection of his field and crops if he does not thereby interfere with the reasonable use of the road as a pent road.

Although the statute uses the general term "highways," in providing that owners of lands are not bound to make and maintain fences on the sides of highways, and does not in terms distinguish between open public highways and pent roads, which are public, but not open, highways—yet, when all the provisions of the statute on the subject are construed together, as they must be, it is considered that the term "highways," as used, was not intended to include, and does not include, pent roads.

The statute that the selectmen may allow pent roads to be

inclosed and occupied by the owner of the land, and bars and gates to be erected thereon, we construe to embrace a case like this, where the road is wholly on the land of one but contiguous to the land of another ; and that section and the one imposing a penalty for wilfully removing such bars and gates, thereby exposing the lands and crops of any person to damage, clearly indicate that the owner may occupy the road as a part of the field through which it runs, and that his occupancy of his field shall not be interfered with by the road any farther than is necessary for the reasonable use of it as a pent road ; from which it logically follows that the rights and obligations between him and an adjoining owner in respect of division fences remain unaffected by the existence of the road.

This statute thus construed is inconsistent with the idea that the defendant was bound to restrain her cattle from going upon said road and thence into plaintiff's close the same as she would have been had said road been an open highway ; and it qualifies and restricts the statute that owners of lands are not bound to make and maintain fences on the sides of highways, and renders it inapplicable to pent roads, and leaves applicable to this case the statute that owners and occupants of adjoining lands, when the lands of both parties are occupied, shall make and maintain equal portions of the division fence between their respective lands.

It is frequently necessary to qualify and restrict general words in a statute, in order to harmonize the provision with other provisions and give them force and effect. Another instance of this kind may be found, we apprehend, in the statute against nuisances and obstructions in highways, which provides that if a person incloses a part of a highway, or erects a fence upon a highway, he shall incur a penalty. Here the general term "highway" is used, the same as in the statute we have been considering, yet no one would claim, we presume, that the statute intends to make it

unlawful for the owner of the land through which a pent road runs, in the absence of regulations by the selectmen, to erect gates and bars thereon for the protection of his field and crops, as this court has decided he has a right to do.

We decide, therefore, that the replication is bad in substance, which renders it unnecessary to consider the other questions raised and discussed at the bar.

Judgment affirmed and cause remanded.

TOWN OF BARRE AS SCHOOL DISTRICT

v.

SCHOOL DISTRICT NO. 13 IN BARRE.

MAY TERM, 1894.

Adoption of town system of schools. Who is entitled to funds of school districts when abolished.

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1. A school district is a political division created by the state to carry out its policy to educate its youth, and holds any funds coming to it for that purpose as a trustee.
 2. The state may change the territorial limits of school districts at will, and such change simply amounts to a change of trustees.
 3. So when the Legislature by Nos. 20 and 21, Acts of 1892, abolished existing school districts, and made each town a district charged with the education of its youth, the town became entitled to the funds held by the districts for gen-

eral educational purposes, and to any taxes assessed, but not collected.

4. The collection of uncollected taxes would be a settlement of its pecuniary affairs for which the existence of the district is continued by said acts.

Assumpsit. Heard upon an agreed statement of facts at the March term, 1894, Washington county, TYLER, J., presiding. Judgment *pro forma* for the defendant. The plaintiff excepts.

John W. Gordon and Barney & Hoar for the plaintiff.

The legislature has supreme control over the funds of municipalities. *Montpelier v. East Montpelier*, 29 Vt. 12; 1 Dill., Mun. Cor., ss. 66, 187; *Laramie County v. Albany County*, 92 U. S. 307; Cool., Const. Lim., 192; 1 Greenl., Ev., (4th Ed.), s. 331; *Darlington v. New York*, 31 N. Y. 164; *Railroad Co. v. Ellenan*, 105 U. S. 166.

When a municipality is abolished and no provision made as to its funds, they belong to its successor. 1 Dill., Mun. Cor., s. 186; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *School District v. Tapley*, 1 Allen 49; *Stoneham v. Richardson*, 23 Pick. 68; *Thompson v. Abbott*, 61 Mo. 176.

Funds collected by school districts for school purposes are held in trust for the state. *Stoneham v. Richardson*, 23 Pick. 62, 69; *Ford v. School Dist.*, *Kendall Burrough*, 1 L. R. A., 607; *School Dist. v. Bridport*, 63 Vt. 383, 390; *Indiana ex rel. v. Waworth*, 7 L. R. A., 240; *East Hartford v. The Hartford Bridge Co.*, 10 How., 511; *Willimantic School Soc. v. First School Soc.*, 14 Conn. 456.

W. A. & O. B. Boyce for the defendant.

The funds in the hands of the school district belong neither to the town nor the district, but to the taxpayers of the district. *School Dist. No. 1 v. Bridport*, 63 Vt. 383.

ROSS, C. J. In this action the town of Barre, in its capacity as a school district, seeks to recover from school district No. 13, in Barre, four hundred sixty-six dollars and fifty-seven cents, and what may be realized from two hundred dollars uncollected taxes. To recover the latter, except for the agreement of the parties, this form of action, assumpsit in the common counts, would not be applicable. The case has been made up and the facts agreed upon, including the uncollected taxes, to enable the parties to obtain the opinion of this court, with reference to the relative rights of the parties to the fund in controversy. Prior to the passage of acts numbered 20 and 21, of the Laws of 1892, the defendant had been a school district in the town of Barre. These acts took effect April 1, 1893. The defendant then had money collected by tax duly assessed upon the inhabitants of the district for defraying current expenses, and the payment of the indebtedness of the district, to the amount of one hundred fifty-three dollars and twelve cents, and there was still an amount of two hundred dollars of this tax uncollected. It also had in money three hundred thirteen dollars and forty-five cents, received from the town on the division of the public school money. It was indebted eleven hundred dollars for the land on which its schoolhouse stood, and for erecting and repairing its schoolhouse. The defendant claims the right to return the four hundred sixty-six dollars and fifty-seven cents to the taxpayers in the district *pro rata*, and to have the residue of the tax uncollected. The plaintiff claims this fund, including as well what the defendant can realize from the uncollected taxes to be used in the town for school purposes. As early as 1797 the legislature provided that every town should maintain one or more schools therein for the instruction of the young. The town was given power to divide its territory into such a number of school districts as it might deem necessary to furnish the required instruction. Each school district became a cor-

poration. Its sole power and function were to provide the required instruction to the young of all classes. Only for that purpose could it assess taxes. The Acts of 1892 declare that all such school districts shall no longer exist "except for the settlement of their pecuniary affairs," and constitute each town into a single district for school purposes. These acts contain no specific provision in regard to the settlement of such pecuniary affairs. They provide that the town shall take charge of all the school buildings and school property, and assume and pay all debts outstanding incurred for the purchase of land, and the erection and repair of schoolhouses.

The money which the defendant had April 1, 1893, coming from its own tax and what it should realize from the uncollected taxes, had by law and the vote of the district been appropriated to defraying its current expenses, and to the payment of its indebtedness. It belonged to the defendant, and not to its taxpayers, to be used for these purposes. The defendant held it, and had the right to the uncollected portion of the tax for these purposes, and for these purposes only. It was a trustee, created by law, for the accomplishment of a state purpose, and for the execution of the policy of the state of educating all the youth of its inhabitants. The three hundred thirteen dollars and forty-five cents, which it received from the town as its portion of the public money, had been devoted and set apart by law to the accomplishment of the same purpose. It held this in trust for school purposes. It came from the interest on the United States deposit money and the Huntington fund, and from the state tax and town school fund. The whole fund in controversy, under various laws, was devoted to the purpose of maintaining public schools. The defendant had been constituted a trustee by law, and held the fund for this single purpose. It could not lawfully divert it from such purpose. *Howe v. School District*, 43 Vt. 282. On April 1,

1893, the defendant ceased to be such trustee. It only had power left to settle its pecuniary affairs. This empowered it to finish the collection of the existing tax. Its power further to carry on the purpose to which these funds were devoted was taken away. To still carry on this state purpose the town was constituted a single school district. The purpose for which this money had been raised, and to which it had been devoted, is a continuing state purpose. What might have been the right of the district to return this fund to the taxpayers if the state had abandoned, and had no longer continued and enforced the policy of educating all its youth, is not presented, and need not be considered. It is still the policy of the state to educate all its youth. They are still its beneficiaries. It needs, to carry forward this purpose, all the money which has been devoted to it. The defendant, a legal entity, created by law to carry forward this state purpose, though compelled by the state to create part of the fund in controversy, has no right, no power to divert any of it from the purpose to which the law has devoted it. By Acts 20 and 21, of the Laws of 1892, the legislature has provided that the defendant shall cease to exercise the function of a public educational trustee, and the town is created such public trustee, charged with the duty and given the power to carry on the trust. It has become the legal successor and trustee in place of all the school districts into which, under the law theretofore, it had divided its territory. This is not a case where the legislature, as in *Montpelier v. East Montpelier*, 27 Vt. 704, and 29 Vt. 12, has dissolved one entity charged with a trust duty without providing another trustee to carry forward and administer the trust, so that a court of equity must needs be resorted to to appoint the trustee. Here the legislature has created the successor, and the work of the trust is being carried forward by it. The education of its youth is a state work, created, controlled and enforced by public laws. It follows necessarily that the

legislature has the right and power to determine when, how and by whom its work shall be carried on; to change the agencies it has created; and to control and direct the expenditure of any unexpended fund it has caused to be raised for such purpose. So are the decisions. *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Stoneham v. Richardson*, 23 Pick. 62; *City of Winona v. School District No. 82*, 40 Minn. 13 (12 Am. St. R. 687); *Williams v. School District*, 33 Vt. 271; *School District v. Concord*, 64 N. H. 235; *School District v. Greenfield*, 64 N. H. 84. Unless controlled by the act of the legislature making the change, the newly created trustee generally takes the trust fund in the hands of its predecessor, whose function to carry on the trust has been taken away. The legislature in making the change, has made no specific provisions in regard to trust funds left unexpended by the old school districts. The right to expend the funds on hand and those which may be realized from the uncollected portion of the existing tax, is taken from the defendant. That right has passed to its successor, the plaintiff. Hence, the plaintiff is entitled to recover the fund in hand and what the defendant may realize from the tax which remains uncollected. The power reserved to the defendant, "for the settlement of its pecuniary affairs," gives it the right to enforce the collection of the remainder of the outstanding tax. When it has completed the collection of this tax and paid the fund then in hand over to the plaintiff, its function will be performed, and, under the terms of the act, it will cease to exist. Inasmuch as the amount which it will, or should, receive from the collection of the outstanding tax cannot now be ascertained, the case must go back to the county court to have that sum ascertained in accordance with the understanding of the parties.

Judgment reversed and cause remanded, to be proceeded with according to the views herein expressed, without costs, as stipulated.

L. J. WALBRIDGE ET ALS.

v.

CABOT AND WALDEN.

OCTOBER TERM, 1894.

Laying of highway by court's commission. Recommittal of report for failure to give notice.

Upon the coming in of the report of commissioners appointed by the supreme court upon petition for the establishment of a highway running through two towns, if the report fails to show that a particular land owner had notice of the proceedings, and he makes affidavit that he had no such notice, the report should be recommitted, with instructions to give such notice and an opportunity for hearing.

Petition to the supreme court for the county of Washington for the laying of a highway in the towns of Cabot and Walden. Heard upon the report of commissioners.

George M. Webster and Lyndon McAllister filed affidavits that the highway as laid by the commissioners crossed their lands, and that they had never received any notice of the proceedings, and never been heard in the premises. The report did not show such notice.

J. P. Lamson for land owners.

Since the commissioners failed to give all the land owners

notice, their proceedings are void. *LaFarrier v. Hardy*, 66 Vt. 200; *Lynch v. Rutland*, 66 Vt. 570; *Weymouth v. Commrs. York Co.*, 29 Alt. Rep. 1100; *Thetford v. Kilburn*, 36 Vt. 179; *Brooks v. Barnet*, 57 Vt. 172.

ROSS, C. J. The commissioners do not report that they gave Lyndon McAllister any notice and opportunity to be heard, upon whether the public good or convenience and necessity of individuals required the taking of his land for the establishment of the proposed highway. His affidavit is that he had no such notice. Such notice is necessary to give the commissioners, and this court whose officers they are, jurisdiction to take and appropriate his land to such use. *LaFarrier v. Hardy et al.*, 66 Vt. 200; *Lynch v. Rutland*, 66 Vt. 570. The report must be recommitted to have them give him the requisite notice and an opportunity to be heard upon whether the public good or convenience and necessity of individuals require the establishment of the proposed highway, and the taking of his land for such purpose; and, if after such hearing, the commissioners recommend the establishment of the highway, to give him notice and an opportunity to be heard in regard to the damages sustained by him. If they still recommend the establishment of the highway, the commissioners will also state the bearings of the courses of the survey of the road of 1871, which they adopt, and also the damages in money which they award to the several land owners, if the towns should not build the fences and cattle passes ordered. The location of the cattle passes ought to be fixed with more certainty. While some expressions used by the commissioners would indicate that they have overstepped their legitimate powers, especially in determining whether the proposed highway should be laid out and established, and when it should be laid open for work and for travel; yet their report need not be recommitted for these defects, inasmuch as this court can treat

these statements as recommendations merely, and has the power to reject them entirely, and make such orders in those respects as it deems just and right under the statute.

Report recommitted, with an order.

STANDARD GRANITE COMPANY QUARRIES

v.

F. C. AIKEY.

OCTOBER TERM, 1894.

Construction of stipulation by county court.

1. The construction of a stipulation by the county court will not be revised in the supreme court if it is legally susceptible of the construction put upon it.
2. A written stipulation between counsel that a cause pending before a justice shall be continued to a certain day, and that if there is "any reason" why either party cannot attend on that day it shall be further continued to a subsequent day, is susceptible of the interpretation that in case of inability of one party to attend, the cause must stand continued, and that the justice has no jurisdiction to render judgment.

Petition for an appeal from the judgment of a justice upon the ground of fraud, accident and mistake. Heard at the June term, 1894, Caledonia county, TYLER, J., presiding.

Prayer of the petition granted, and appeal allowed. The petitionee excepts.

E. B. Bullard for the petitioner.

The county court had discretionary power to grant the relief asked for, and the exercise of that discretion cannot be revised. *Harriman v. Swift*, 31 Vt. 385; *Congdon v. Congdon*, 59 Vt. 597; *Lillie v. Lillie's Est.*, 56 Vt. 714.

Albert Perley for the petitionee.

The reason alleged by the petitioner for not attending was that he forgot the day. This is no legal excuse. *Babcock v. Brown*, 25 Vt. 550; *Davidson v. Heffron*, 31 Vt. 687; *Denison v. True*, 22 Vt. 42.

ROSS, C. J. In *Foster's Exrs. v. Dickerson et al.*, 64 Vt. 233, it is held that the action of the county court, in construing a stipulation between counsel, will not be revised by this court if the stipulation is fairly susceptible of the construction put upon it by that court. The error alleged is, the construction given by the county court in regard to the continuance of the case sought to have entered as an appeal case, when it was pending before the justice. In the justice court the case had been continued once or twice, and stood for trial January 2, 1894. Before that day arrived the counsel stipulated in writing that the case should be continued to January 8, 1894. The stipulation contained the further provision :

"If there is any reason why either of the parties cannot attend on this day, then said cause shall be continued to a subsequent day."

As first drawn, the word "valid" was written as qualifying the word "reason," but was stricken out. The county court construed the stipulation to require no action by the justice to continue the case, but that in the absence of one party the

other should continue it by force of the agreement, and that the word party included counsel. The stipulation, read in the light of the surrounding circumstances, is fairly capable of this construction. It could not well be otherwise construed. The counsel were continuing the case without resort to the justice, and providing that if either of them, for *any reason*, on the day to which the continuance was made, could not attend, "*then said cause shall be continued to a subsequent day.*" The counsel of the petitioner, on January 8, was called away on business. The counsel for the petitionee went to his office and found him gone. The stipulation clearly required that he should continue the case, or keep it open until the counsel of the petitioner returned. He was not entitled to take judgment by default or otherwise.

Judgment affirmed and remanded.

L. W. HASTINGS v. J. C. ADAMS.

OCTOBER TERM, 1894.

*Promissory note. Representations upon which given.
Estoppel to make defence.*

The defendant bought a mowing machine upon condition that he need not pay for it if it did not work well. Subsequently he gave his note, payable in one year, upon the understanding that he could within the year ascertain whether the machine was satisfactory. *Held*, that having made no complaint until after the maturity of the note he could not then, under the circumstances of this case, make the defence that the machine did not work well.

Assumpsit upon a promissory note. Heard upon the report of a referee at the March term, 1894, Essex county, THOMPSON, J., presiding. Judgment for the plaintiff. The defendant excepts.

W. P. Stafford for the defendant.

The plaintiff is not entitled to any greater rights than the payee, for he did not become the owner until long after maturity. *Hartford, etc., Co. v. Brush*, 43 Vt. 528; *McClure v. Briggs*, 58 Vt. 82; *Daggett v. Johnson*, 49 Vt. 345.

O. F. Harvey and *Harry Blodgett* for the plaintiff.

The defendant should have repudiated the contract for the machine within the year. *Dennis v. Stoughton*, 55 Vt. 371.

TYLER, J. The report shows that in the year 1889 and subsequently the Wm. N. Whiteley Co. were engaged in selling mowing machines, and that one Pooler was their agent, having for his territory certain northern towns in Vermont and New Hampshire. In the summer of that year one Russell acted as Pooler's agent in selling machines in Victory, and assisted him in selling one to the defendant. They warranted it to be first-class and capable of doing good work on the defendant's farm, and agreed that the defendant was not to pay for it unless it proved satisfactory. The defendant took it on those terms. On trial it proved to have been improperly constructed, did not work well, and was unsatisfactory to the defendant. On complaints being made by the defendant, Whitely & Co.'s workman tried to repair it that year, and again the following year, and urged the defendant to make further trial of it. Finally the defendant notified Pooler and Russell that he could not use the machine, and did not wish to try it further. In July, 1890, Pooler went to the defendant's and saw the machine, examined and tested it, and directed the defendant to remove it to St. Johnsbury where, it was agreed, he might exchange it for another machine on the same terms as were made for the first one. The defendant made the exchange as directed.

It is found that Russell had told the defendant not to give his note for the machine until it proved satisfactory, and that Russell had informed Pooler that he had so advised the defendant.

Soon after the exchange was made, and on August 1, 1890, Pooler called on the defendant for a note for the mower, and said to him that he would put off payment of the note a year, so that if the mower did not work well the defendant would not have to pay the note. On those conditions the note in suit was given, payable in one year from its date, and the defendant thereafter kept and used the

mower, made little if any complaint about it, made no complaint to Pooler or Russell, did not offer to return it or rescind the bargain, and was not called on to pay the note until after Russell's insolvency.

By an arrangement made between Pooler and Russell in the fall of 1889, the obligation from the defendant for this machine, with other like obligations, became Russell's property, and when the note was given, payable to the Wm. N. Whiteley Co., it was indorsed to Russell and became his property, and he so informed the defendant and that Pooler was to make the machine satisfactory to him.

In October, 1891, Russell was adjudged an insolvent, and his assignee sold by auction this note with others to the plaintiff, who gave defendant notice of his ownership. The defendant replied that the mower did not work well, but that he would soon "fix it up."

The defendant by the act of giving the note, in the circumstances detailed by the referee, limited the time within which he might refuse to accept the machine to one year, the time the note was to run. After the maturity of the note he was, by the terms of the agreement, precluded from setting up in defence of the note a claim that the machine was unsatisfactory, or did not work well.

Judgment affirmed.

W. M. KENDALL

v.

D. B. AND DAVID HATHAWAY ET AL.

W. M. KENDALL v. B. D. HATHAWAY ET AL.

OCTOBER TERM, 1894.

Fixtures. Machinery.

1. Whether machinery attached to the freehold after the execution of a mortgage, and not referred to in the mortgage, belongs to the mortgagee or to the grantee of the mortgagor must be determined by the decisions in this state, as though the statute permitting the mortgaging of machinery had never been enacted.
2. In order to change the character of property from chattel to real by annexation to the freehold, it must be attached in such a manner that it cannot be removed without permanent injury to the realty or to the property itself as a chattel.
3. A cider mill and shingle mill standing on legs, and only held in place by the belts which run them, and a circular saw-mill so attached to the building that it can be removed without damage to itself or the building, are chattels, and do not pass under the mortgage.

These two suits were heard together, the question in each being the same. The first was trover for a shingle mill, and the second replevin for a circular saw-mill and cider mill. Trial by court at the May term, 1894, Windsor county, THOMPSON, J., presiding. Upon the facts found judgment was given in the trover suit for the defendants to recover their costs, and in the replevin suit for a return of

the property, one cent damages and costs. The plaintiff excepts.

The plaintiff owned a farm which he sold to one Tracy, who mortgaged back for the purchase money. Subsequently Tracy sold a small piece to the defendants, which he conveyed by warranty deed, and upon which they built a mill. The property in question was put into this mill by them and used there. The manner in which it was attached to the mill appears in the opinion. The plaintiff foreclosed his mortgage, and when it became certain that the defendants' mill must pass under the decree, they removed from it the property in suit.

James G. Harvey and *William Batchelder* for the plaintiff.

The defendants stood the same as the mortgagor. *Davidson v. Gaslight Co.*, 99 N. Y. 558; *Tilman v. DeLacy*, 80 Ala. 103; *Foote v. Gooch*, 96 N. C. 265.

After condition broken, the mortgagee is the owner of the property. His title is made absolute by foreclosure proceedings. *Preston v. Briggs*, 16 Vt. 126; *Hagar v. Brainard et al.*, 44 Vt. 294; *Davenport v. Shants*, 47 Vt. 546; *Lull v. Matthews*, 19 Vt. 322.

The test is not whether the machinery could be removed and used elsewhere. *Roddy v. Brick*, 42 N. J. Eq. 218; *Newhall & Stebbins v. Kinney*, 56 Vt. 591; *Allen v. Mooney*, 130 Mass. 157; *Jones, Mort.*, 444, note 4; *Walmsley v. Milne*, 7 C. B. N. S. 115-118; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Southbridge Bank v. Exeter Mch. Wks.*, 127 Mass. 542; *Pierce v. George*, 108 Mass. 78; *McConnell v. Blood*, 123 Mass. 47; *McLaughlin v. Nash*, 14 Allen 136; *Langdon v. Buchanan*, 62 N. H. 657.

William E. Johnson for the defendants.

The property sued for had not become a part of the realty. *Tobias v. Francis*, 3 Vt. 431; *Sturgis v. Warren*, 11 Vt. 433; *Fullam et al. v. Stearns et al.*, 30 Vt. 443; *Hill v. Wentworth*, 28 Vt. 428, 429; *Bartlett v. Ward et al.*, 32 Vt. 372; *Harris v. Haynes*, 34 Vt. 224; *Davenport v. Shants et al.*, 43 Vt. 546; *Newhall & Stebbins v. Kinney & Miles*, 56 Vt. 541.

ROSS, C. J. These cases were heard together. The first named is replevin, and the last trover. The parties in interest are the same in both cases. The first is to recover a circular saw-mill, a cider mill, and some machinery. The second is to recover for a shingle machine. The rights of plaintiff to the property in both suits, if any, are derived from a mortgage of a farm from the grantor of the defendant Hathaways, executed in 1866. At that time the part of the farm on which the property sued for was afterwards placed and used, was unimproved, and the mortgage contains no words descriptive of the property in controversy, subsequently placed thereon by the Hathaways. Hence the plaintiff's rights to the property in controversy are to be determined upon the basis of whether the property, on the facts found, was real estate. Although in 1860 the statute was enacted, now R. L. 1980, allowing "machinery attached to, or used in a shop, mill, printing office or factory," to be mortgaged by a deed executed as required for the conveyance of real estate, that statute is not applicable, inasmuch as when the mortgage determinative of the plaintiff's rights was executed, the machinery in controversy did not exist, and is not alluded to in the mortgage. The defendants, Hathaways, purchased a small piece of the land covered by the plaintiff's mortgage, from the mortgagor in 1871, took a duly executed warranty deed thereof, created a water power, and erected a saw-mill and grist mill thereon. The other defendants stand upon the

rights of the Hathaways. Hence the controversy, involved in these suits, is to be determined by the law established by the decisions of this court as existing between mortgagor and mortgagee, without reference to the law of 1860, providing for the mortgage of machinery. There was no machinery in existence, and no attempt to describe or mortgage any when the mortgage, under which the rights of the plaintiff and defendants are to be determined, was executed. The contention is narrowed to whether, under the decisions of this court, the property sued for was fixtures, or personal property. If any of it, on the facts found, had become a fixture, the plaintiff can recover for it. This is his only right of recovery. The decisions of other courts, at variance with the decisions of this court, cannot control. The decisions of this court on this subject are of so long standing and of so frequent occurrence that they have become rules of property presumably acted upon by parties; and, if in conflict with the decisions of other courts, to reverse them would disturb and overthrow rights of property. The decisions of this court determinative of the relative rights of the mortgagor and mortgagee to machines and machinery, when not controlled by the words used, descriptive of the property intended to be conveyed, are *Tobias v. Francis*, 3 Vt. 431; *Sturgis v. Warren*, 11 Vt. 433; *Hill v. Wentworth*, 28 Vt. 428; *Fullam et al. v. Stearns et al.*, 30 Vt. 443; *Bartlett v. Wood et al.*, 32 Vt. 372; *Harris v. Haynes*, 34 Vt. 224; *Davenport v. Shants et al.*, 43 Vt. 546; *Newhall & Stebbins v. Kinney & Miles*, 56 Vt. 591; *Hackett v. Amsden*, 57 Vt. 432, and perhaps some other cases in which the question has been incidentally touched upon. Unless controlled by the language of the deed descriptive of the property intended to be conveyed, or by language which brings it within the statute allowing machinery to be mortgaged, there is no conflict in the principles governing these decisions. This principle is as fully stated and summarized in *Harris v. Haynes*, 34

Vt. 225, as in any of the cases. It is there stated as follows :

“It is sufficient to say that the leading principle resulting from those decisions is, that actual annexation to the freehold and adaptation to its purposes is not sufficient to convert chattels into fixtures, unless they are fastened in such a manner as to show an intention to incorporate them firmly with the inheritance ; and, that if articles of machinery, used in a factory for manufacturing purposes, are only attached to the buildings to keep them steady and in their place, so that their use, as chattels, may be more beneficial, and are attached in such a way that they can be removed without any essential injury to the freehold, or to the articles themselves, they still remain personal property.”

The announcement of this principle followed the decisions of *Hill v. Wentworth*, of *Fullam et al. v. Stearns et al.*, and of *Bartlett v. Wood et al.*, in which the question of what was necessary to be done by the owner of a personal chattel to incorporate it into the freehold, so that it would become a fixture or part of the freehold, had been fully discussed, considered and determined, with reference to a great variety of machines used in buildings erected, and used for various manufacturing purposes. The circular saw-mill and parts connected therewith, the shingle machine and the cider mill, were each a machine or personal chattel before it was set up by the Hathaways in their mill. The grist mill, though named in the replevin suit, was not replevied, and is not for consideration here. The shingle mill and the cider mill stood upon legs, and were held in place by their own weight. They were not attached to the building otherwise than by being connected with the motive power by belts. The circular saw-mill and parts connected therewith were not permanently attached to the building. All were so placed and constructed that they could be removed without injury to themselves and without injury to the building. They could be used with equal facility in any building where suitable power could be obtained. The

building itself could be refitted with similar machines. These were all placed in the building by the Hathaways for use only so long as they might desire. They were removed by them with the intent and purpose of using them in another building. The finding that the Hathaways had no specific intention of removing these machines and parts connected therewith, until made aware that their water power, mill, and everything contained therein would be taken in payment of a debt which they never contracted nor were liable to pay, unless they then removed these machines, does not vary their legal right to remove them while lawfully in possession of the property as established by the character of the machines and connected parts, fixed and determined by the manner in which they were connected with the freehold. As considered and shown in *Fullam et al. v. Stearns et al.*, 30 Vt. 443, between the mortgagor and mortgagee and the creditors of the latter, the manner in which such machines are annexed to the freehold determines whether they remain personal chattels, or have been converted into fixtures. Until the law allowing machinery to be mortgaged, the creditor and his officer could determine whether the machine remained a personal chattel or had become a fixture, only from the character of the machine, the manner of its attachment to the freehold, and whether it could be removed without substantial injury to itself and to the freehold, and whether it was equally well adapted for use in any other building equipped with proper motive power. Upon these principles, on the facts found, the property in controversy in both suits must be held to be personal chattels, which the Hathaways had the right to remove.

Judgments affirmed.

LUCY ROBINSON

v.

M. V. B. LEACH, ASSIGNEE, ET AL.

JANUARY TERM, 1895.

Homestead. On what debts attachable. Renewal note.

1. Under our statute subjecting a homestead to attachment upon "causes of action existing at the time," the homestead is attachable upon a note given after its acquisition in renewal of a note existing before.
2. When and to what extent a note operates as a payment of an indebtedness.

Appeal from an order of the court of insolvency for the district of Fair Haven. Heard upon an agreed statement of facts at the September term, 1894, Rutland county, START, J., presiding. The court affirmed the decree of the court of insolvency, holding that the homestead was subject to the claimant's debt. The defendant excepts.

Fayette Potter for the defendant.

The giving of the new note extinguished the former debt. Hence, the renewal note was not a cause of action existing at the time the homestead was acquired. *Ricker v. Adams*, 59 Vt. 154; *Hutchins v. Olcott*, 4 Vt. 549.

J. C. Baker for the plaintiff.

The taking of a note does not work a payment of the indebtedness unless such is the agreement of the parties. 3 Rand., Com. Paper, 1509; 18 Am. & Eng. Enc. of Law, 167; *Pinney v. Kimpton*, 46 Vt. 80; *Poland v. Railroad*, 52 Vt. 144; *Trust Co. v. Waddell*, 75 Hun. 104; *Kidder v. Knox*, 48 Me. 551; *Lee v. Hollister*, 5 Fed. 752; *McLaughlin v. Bank*, 7 How. 228; *Lowry v. Fisher*, 92 Am. Dec. 475; *Bank v. Bridgers*, 98 N. Y. 67; *Dickinson v. King*, 28 Vt. 378.

ROWELL, J. The question is whether a homestead is exempt from a note given by the homesteader after its acquisition, in renewal of his notes given before its acquisition, the parties to the notes being the same.

The statute subjects the homestead to attachment and levy of execution upon "causes of action existing at the time" it is acquired. It is contended that the cause of action meant is, the claim that the plaintiff makes and declares upon as the ground of his suit, and which is to be litigated on trial. But this construction is too strict. The words, "causes of action," are evidently used in a sense broad enough to embrace the debt as distinguished from the evidence of it. The statute is the same for the purposes of this case as though it read, "debts existing," etc. Hence, if the original debt can be said to exist, the case is with the plaintiff.

Courts will if they can, when justice requires it, look behind the evidence of the debt and consider the debt itself, and decide according to that. This is always done when mortgage notes are renewed. As long as the original debt can be traced the security remains, no matter how many renewals there have been. So in *Conway v. Seamons*, 55 Vt. 8, we looked behind a judgment rendered after the defendant's discharge in insolvency, but founded on a note unaffected by the discharge, and held the judgment not discharged because the note was not. The ground of the

holding was, that although the note as evidence of the indebtedness was merged in the judgment, yet the judgment was not to all intents a new debt, but the old debt in a new form for the purpose of protecting the right connected therewith before the judgment. The same view was held and applied in *Pinney v. Kimpton*, 46 Vt. 80. There the plaintiff held a note as collateral for signing with another. Having had to pay, he took the note of his principal for the amount, and afterwards brought suit on the collateral. It was held that by taking his principal's note he did not discharge his claim on the note he held as collateral. The court said that the debt still existed though evidenced by the principal's note; that in an action against the principal for the collection of the debt the plaintiff would, in form, be confined to his remedy on the note instead of the open account; that in this sense and for this purpose it is often said in this state that the giving of a promissory note for an existing debt is *prima facie* payment; but that it is not payment in the sense of extinguishing the debt so as to discharge the creditor's claim on property put into his hands by the debtor as collateral security for the debt, unless so agreed.

This principle is entirely applicable here. The new note was but a new evidence of the old debt. True, the old notes were extinguished as affording a ground or cause of action, but the debt evidenced thereby continued to exist for the purpose of preserving the right against the homestead that was originally connected with it. *Weaver's Estate*, 25 Pa. St. 434, is a case precisely like this. There a creditor held the promissory note of his debtor, given before the passage of the homestead act. After its passage he gave up that note and took in place of it a single bill with warrant of attorney for confession of judgment, and it was held that a judgment entered on the bill was not subject to the act. Even where a negotiable promissory note given for land and payable to the vendor went into the hands of a third person,

who, while he held it, took a new note therefor payable to himself with a party added as surety, it was held that this was not such a novation of the original contract that a homestead laid off in the land was not subject to levy and sale to satisfy a judgment founded on the bill. *Wofford v. Gaines*, 53 Ga. 485. Cf. *Perrin v. Sargent*, 33 Vt. 84.

The defendant relies on *Hutchins v. Olcott*, 4 Vt. 549, where it was held that the taking of a negotiable promissory note is an extinguishment of any implied promise on the part of the maker to pay the consideration for which the note was given, and that therefore the taking of such a note in payment of an account for labor bestowed on an article is such a manifestation of the intent of the taker to rely on the personal security of the maker as to be a waiver of any lien given by law on the property. The ground of that decision seems to be that the lien is but an incident of the implied contract, and so when the creditor takes a note, thereby extinguishing that contract, which is the principal thing, he must be taken to intend to waive the lien, which is the incident. If this case is opposed to what we now hold, it must be regarded as departed from to that extent.

Judgment affirmed and ordered to be certified to the court of insolvency.

M. BRIDGMAN ET AL. v. TOWN OF HARDWICK.

OCTOBER TERM, 1894.

Highways. When lane is used as pent road. When it connects existing highways.

1. No. 16, Acts 1884, does not authorize the laying of a lane less than three rods wide, to be used without gates and bars, for such a lane is an open highway and not a pent road.
2. A lane does not connect highways within the meaning of that act unless each end terminates in a highway.

Petition for the laying of a highway. Heard upon the report of commissioners and exceptions of the petitioners thereto at the June term, 1894, Caledonia county, TYLER, J., presiding. The court established the highway according to the report. The petitioners except.

The petitioners excepted to the report of the commissioners :

1st. Because the road laid was an open public highway and not three rods wide.

2d. Because the road was not laid over the route specified in the petition.

Bates & May for the petitioners.

The road laid was an open public highway, and should

have been at least three rods wide. *Warner v. Stockwell*, 9 Vt. 20; *Nelson v. Dennison*, 17 Vt. 77.

W. H. Taylor for the defendant.

The route adopted was sufficiently near the one asked for. *Orrington v. Co. Com.*, 51 Me. 570; *Kent v. Wallingford*, 42 Vt. 651; *Kelly et al. v. Danby et al.*, 46 Vt. 504.

Since the report designates this as a lane, the presumption is that it is to be used as a pent road. *Wolcott v. Whitcomb*, 40 Vt. 40; *Whitingham v. Bowen*, 22 Vt. 317; *French v. Barre*, 58 Vt. 573; *Kiddèr v. Jennison*, 21 Vt. 108.

START, J. On the report of the commissioners the court below laid out a lane, under No. 16, of the Acts of 1884, to be used without gates or bars. The lane does not connect with an existing highway at its westerly terminus, and is less than three rods wide; and it does not appear that it is in an incorporated village or city.

It is claimed by the petitioners' counsel that the highway as laid out is an open public highway, and that the statute does not authorize the laying out of such a highway less than three rods wide, except in incorporated villages and cities, to connect existing highways. It is clear that the highway as laid out is an open public highway. It is to be used without gates or bars. This makes it an *open* highway, and not a lane within the meaning of the act of 1884, as was held by the court below. This act provides that public highways shall not be less than three rods wide, but if laid within the limits of an incorporated village or city to connect existing highways, they may be of less width, and cross roads and lanes, to be used as pent roads, may be of less width. This act does not authorize the laying out of a lane less than three rods wide, unless it is laid out to be used as a pent road. The lane was laid out less than three rods

wide and was not laid out as a pent road, as it was to be used without gates or bars. A pent road is one that may be enclosed by gates or bars, and is not an open highway. *Wolcott v. Whitcomb*, 40 Vt. 40; *French v. Holl*, 53 Vt. 364. The court below, by providing that the lane should be used without gates or bars, laid out the lane as an open highway; and its action was not authorized by that part of the act of 1884 which provides for the laying out of lanes.

It is claimed by the defendant's counsel that the highway as laid out is within the limits of the village of Hardwick; that the village is incorporated; that the highway connects existing highways within the meaning of the act of 1884; and that the action of the court below can be sustained under that clause of the act which provides that, if the highway is laid within the limits of an incorporated village or city, to connect existing highways, it may be less than three rods wide. This claim is not supported by the findings of the commissioners. It does not appear that the highway is within the limits of the village of Hardwick, nor does it appear that the inhabitants of the village have ever accepted of the act of incorporation or organized under it; and it is expressly found that the westerly terminus of the highway as laid out does not connect with an existing highway. To authorize the laying of a highway under the provisions of this act, the highway as laid must connect with an existing highway at both terminal points. It is not enough that one terminal point connects with an existing highway. The language of the enactment is plain. To connect is to join, unite, bind, or fasten together. A highway that does not intersect an existing highway at more than one of its terminal points does not connect existing highways, and is not authorized by the provisions of the act relied upon by the defendant's counsel.

It is claimed by the petitioners' counsel that the highway is not laid over the route described in the petition, but over

another and different route. We have not been furnished with a copy of the petition, and it does not appear that the terminal points of the proposed highway were definitely described in the petition. It appears from the exceptions that no part of the highway as laid is wholly off the route described in the petition. It would seem from this statement that some portion of the highway as laid extended to the terminal points of the proposed highway. From the record before us, we cannot say that the highway as laid is materially different from the proposed highway as described in the petition. If it was not, the holding of the court upon this branch of the case was correct.

Judgment reversed, order vacated and cause remanded.

SWERDFERGER AND WIFE

v.

AMOS D. HOPKINS.

FEBRUARY TERM, 1894.

Amendment of declaration. Joinder of husband and wife.

Evidence. Cross-examination of adverse party.

Trial. Hearing in supreme court.

*Description of premises in
quare clausum.*

1. Where, in an action for trespass *quare clausum* brought in the name of the husband and wife, the declaration describes the premises as the property of the plaintiffs, the court may, upon trial, allow such an amendment as to show the title in the *femme* plaintiff.
2. If the county court has the legal right to allow an amendment, the granting of the same is matter of discretion, and the action of the court in that respect cannot be revised here.
3. Husband and wife may join in an action for trespass to the real estate of the wife if the husband has any marital rights therein. Whether they can so join in case of real estate held to the sole and separate use of the wife, is not decided.
4. The plaintiffs claimed that under their deed they took to a certain line, and that if they did not obtain title by their deed they had it by adverse possession. *Held*, that a former occupant and owner of the premises might testify that he understood the line to be at that time where the plaintiffs now claim it.

5. A former owner and occupant might testify that upon one occasion the owner of the adjacent lot, under whom the defendant took title, claimed a portion of the land occupied by him, and that he thereupon told said owner that he, the witness, had bought to the line claimed by the plaintiffs, and should hold to that line unless legally prevented.
6. The statements of a witness made to a third person, not in the presence of the defendant or his grantor, tending to show the contents of a written instrument, as to which parol testimony had been excluded, were improperly admitted.
7. Statements of a former owner or occupant to a third person, not in the presence of the defendant or his grantor, as to what had been the extent of that owner's occupancy, were improperly admitted.
8. The husband and wife being properly joined as parties, the wife was a competent witness.
9. A witness called by the defendant testified that a former owner of the plaintiffs' land pointed out on one occasion the boundary of his lot. *Held*, that the plaintiff might properly ask him, on cross-examination, what the owner said about the boundary of the lot when pointing it out.
10. A witness of the defendant having testified that, when working for a former owner of the defendant's lot, he had piled lumber belonging to such owner upon the premises in dispute, he may be properly asked on cross-examination with reference to disputes between the owners of the respective lots growing out of the placing of the lumber there.
11. A party may cross-examine the adverse party upon any subject material to the controversy, whether such adverse party has testified about the same in chief or not.
12. It does not necessarily follow that testimony in the same line with that given by the plaintiff in the opening of his case is not strictly in rebuttal, and where nothing more appears from the record than this, the court will not reverse the judgment upon the ground that such testimony was improperly admitted in rebuttal, although it appears from the exceptions that it was not admitted as matter of discretion.
13. Where an exception is taken to the refusal of the court to charge as requested, and the bill of exceptions refers to the request and charge to show what they were, the question will not be considered in the supreme court unless copies of the request and charge are furnished.

14. A defendant waives his motion for a verdict made at the close of the plaintiff's case by putting in testimony upon his own part, and if at the close of his own testimony he renews his motion for a verdict, but puts the same upon a different ground, only that ground upon which he places his second motion will be considered in the supreme court.
15. It is sufficient in trespass *quare clausum* to describe the premises as part of a certain lot in a given range with a reference to the record of the deed to the plaintiff.

Trespass *quare clausum*. Plea, the general issue. Trial by jury at the June term, 1891, Caledonia county, MUNSON, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepts.

The plaintiffs were husband and wife. The deeds introduced by them showed the title in the wife. When the deed from her immediate grantor to the plaintiff wife was offered in evidence the defendant objected to its admission on the ground of a variance, and excepted to the action of the court in admitting it. At the close of the plaintiffs' testimony the defendant moved the court to direct a verdict in his favor upon the ground of a variance between the proof and the declaration. The court overruled the motion, and the defendant excepted. Thereupon the plaintiffs asked leave to amend the declaration so as to show that the legal title stood in the plaintiff wife, and the court allowed this amendment subject to the objection and exception of the defendant.

At the close of the testimony the defendant moved for a verdict for the reason that the plaintiffs, being husband and wife, were improperly joined, which motion the court overruled, and the defendant excepted.

The plaintiffs and defendant were the owners of adjacent lots, and the dispute was as to the boundary line between these two lots. The plaintiffs claimed to own to a line which ran through a group of plum trees, and which was called upon the trial the plum tree line, and their testimony tended to show that they and their grantors had occupied up to this

line for more than fifteen years and had acquired title to the same by adverse possession, if it was not covered by the description in their deed.

As bearing upon this question one John Nichols, who was for two years the owner of the plaintiffs' premises, was allowed to testify that when he took the property and during the time he occupied it, he *understood* his line to be as claimed by the plaintiffs upon trial. To his testimony as to his understanding of the location of the line the defendant excepted.

William Fort, a witness improved by the plaintiffs, was the husband of one Agnez Fuller, who had formerly held title to the plaintiffs' premises. Fort had occupied the premises with his wife, and he was allowed to testify, against the exception of the defendant, that upon one occasion while living there one Judevine, then the owner of the adjacent lot, came to him, claiming a portion of the premises occupied by him, and that thereupon he said to Judevine that he had bought up to the line as claimed by the plaintiffs and should occupy to that line, and that if Judevine got any of the land it would be by a lawsuit; and that he never heard anything more from Judevine.

One Curtis, a witness for the plaintiffs, testified that he occupied the place as a tenant of Perley, the then owner, from January, 1874, until the fall of 1884, and that during that time he occupied up to the plum tree line. He was further allowed to testify, against the exception of the defendant, that one day in 1876 or 1877 a hired man of Judevine, who then owned the adjacent lot, began to dig post holes for the purpose of constructing a fence upon the line as claimed by the plaintiffs; that Perley objected to the construction of the fence at that point; that after some discussion between Perley and Judevine in reference to that subject, they went to the town clerk's office and drew up and signed an agreement fixing the location of the line in dis-

pute, and that this agreement was left with the town clerk for safe keeping.

The plaintiff attempted to show the loss of this paper and to prove the contents thereof by secondary evidence, but the court excluded the testimony.

It appeared in the cross-examination of this witness that after the writing had been drawn Perley instructed him to bury a piece of wood in one of the old post holes upon the line claimed by the plaintiff, and upon re-examination the witness was allowed to state, under exception, that at the time Perley had stated to him that he wanted the piece of wood buried there to fix the location which they had then agreed upon. And that Perley further said at that time that he had occupied in the past up to the plum tree line.

One Taylor, a witness for the defendant, testified that he had surveyed the lot of the defendant and plaintiffs and had made a plan, which was put in by the defendant; that upon one occasion in talking with Perley about the boundaries of the lot, Perley had pointed out to him a post hole in the line claimed by the plaintiffs. Upon cross-examination the witness was allowed to state, subject to the defendant's exception, what Perley had said about the location of the line upon this occasion.

Pike, a witness for the defendant, testified that he occupied the defendant's premises for nearly one year in 1876, and again from 1885 to 1889. The defendant then offered to show by this witness that he had a talk with Judevine, the owner of the other parcel, and that Judevine pointed out the line of the land in dispute and told him where the line was, and that the line then pointed out was where the defendant now claimed it. This evidence was excluded by the court, under the exception of the defendant.

Johnson, a witness for the defendant, testified that in 1881 while working for Judevine, he piled some lumber belonging to Judevine on the lot in dispute. Upon cross-examina-

tion the plaintiff was allowed to show, subject to the exception of the defendant, that in consequence of piling the lumber there Perley and Judevine, the then owners of the two lots, had some discussion in reference to the line, and that they then referred to a writing which had been drawn up between them for the purpose of determining where the line was.

In the opening of their case the plaintiffs put in proofs as to surveys, distances, and places where they claimed all the trespasses were committed, and the kind and character of those trespasses, and their occupation, etc. In rebuttal the plaintiffs were, under exception, allowed by the court, not in the exercise of its discretion, but as matter of strict legal right, to give in evidence measurements made by the witnesses of the plaintiffs, after the defendant had rested its case in reference to the plum tree line, and to show that certain trespasses were north of an old gateway to which the defendant had claimed.

In reference to the exceptions of the defendant to the charge of the court, the bill of exceptions was as follows :

"The defendant seasonably presented written requests to charge, which are referred to. The entire charge is referred to. The defendant excepted to the refusal of the court to charge in accordance with said requests, and to the charge as given upon the points covered by the requests. Defendant also excepted to the charge as to what the existence of the fences owned indicated if found to exist ; to the charge as to the effect of the fences upon the possession of the plaintiff ; as to its requiring fifteen years adverse possession on the part of the defendant to secure title, if the plaintiff had acquired one ; to so much of the charge as related to ; to the charge that as against any proper title shown by the defendant, plaintiffs need do no more than show a prior possession."

Upon the argument of the case in supreme court no copy of the requests to charge, nor of the charge as given, was furnished the court.

After verdict the defendant moved in arrest of judgment, for that the description in the plaintiffs' declaration was insufficient. The court overruled the motion, and the defendant excepted.

The declaration described the locus as part of a given lot in a certain range, and referred to the record of the deed to the plaintiff.

Bates & May for the defendant.

The plaintiffs' declaration was insufficient. 1 Chitty, Pl., 494, 565, 605, 606; *Davis v. Judge*, 44 Vt. 500; *Sparhawk v. Hall*, 52 Vt. 624; Stephen's Pl., 220.

There was a variance between the declaration and the proof, in that the declaration counted upon a title in both the plaintiffs, while the proof showed title in the wife alone. *Derragon v. Rutland Village*, 58 Vt. 128; *Fullerton v. Seymour*, 5 Vt. 249; *Armstrong and Wife v. Colby*, 47 Vt. 359; *Hayner and Wife v. Smith*, 63 Ill. 430, S. C. 14 Am. Rep. 124; *Davis v. Judge*, 44 Vt. 500.

The husband was improperly joined. *Shaw v. Partridge*, 17 Vt. 627; *Smith v. Fitzgerald*, 59 Vt. 451; *Wright and Wife v. Burroughs*, 61 Vt. 390; *White and Wife v. Wait*, 47 Vt. 502; *Hackett v. Hewitt*, 57 Vt. 442.

If the wife can sue alone, then a misjoinder of her husband is fatal. *Babb and Wife v. Perley*, 1 Me. 6; *Burleigh v. Coffin*, 22 N. H. 118; *Barber v. Root*, 10 Mass. 260; *Van Note v. Downey*, 28 N. J. L. 219; Sch. Domes. Rel., 142 *et seq*; *Brown v. Sumner's Est.*, 31 Vt. 671; *Fisk v. Bailey*, 51 N. Y. 150.

The wife was not a competent witness. *Handlong and Wife v. Barnes*, 30 N. J. L. 69; *Cook v. Avery*, 37 Bk. U. S. S. C. 308.

The witness Nichols was improperly allowed to state his understanding as to the location of the line. *Hackett v.*

Amsden, 59 Vt. 553; *Evarts v. Young*, 32 Vt. 329; *Hale v. Rich*, 48 Vt. 217.

Fort's evidence as to the declarations of Judevine was inadmissible. *Sylvester v. Noble*, 42 Vt. 146; 1 Greenl., Ev., s. 108 *et seq*; *Ellis v. Cleveland*, 55 Vt. 358; *Evarts v. Young*, 52 Vt. 329.

What was developed in the examination of the witness Curtis as having been said by Perley in reference to the contents of the written instrument, was improperly received, as were also his declarations as to the extent of his occupancy. *Putnam v. Fisher*, 52 Vt. 191; *Evarts v. Young*, 52 Vt. 329; *Hadley v. Howe*, 46 Vt. 142; *Wood v. Willard*, 37 Vt. 386.

J. P. Lamson for the plaintiffs.

The amendment showing title in the wife, instead of in the husband and wife, was properly allowed. *Dana et al. v. Sessions*, 65 Vt. 79; *Hathaway v. Sabin*, 63 Vt. 527; *Drown v. Forrest*, 63 Vt. 557; *Haldridge v. Same*, 53 Vt. 546; *Morey v. King*, 49 Vt. 304; *Bailey v. Moulthrop*, 55 Vt. 13; *Norcross v. Welton*, 59 Vt. 50; *Tillotson v. Prichard*, 60 Vt. 94; *Probate Court v. Sawyer*, 59 Vt. 57; *Patton v. Sowles*, 51 Vt. 388; *Myers v. Lyon*, 54 Vt. 488; *Myers v. Lyon*, 51 Vt. 272; *Casey v. Casey*, 55 Vt. 518.

The suit was properly brought in the name of the husband and wife, for the husband had a beneficial interest in the premises. *Smith v. Fitzgerald*, 59 Vt. 453.

TAFT, J. I. The premises are described in the declaration as the lot deeded to the plaintiffs. The plaintiffs offered in evidence a deed from one Perley to the feme plaintiff; objection being made upon the ground of variance between the contract described in the declaration and the one offered in evidence, the court granted leave to amend the declaration, so as to describe the lot as the one deeded

to the feme plaintiff. This amendment did not change the parties nor the nature or cause of action. The court, therefore, had the legal right to permit the amendment to be made, and if the court had power to allow the amendment, its action was discretionary and not revisable. There was no error in granting the motion to amend. *Bowman v. Stowell*, 21 Vt. 309; *Bates v. Cilley*, 47 Vt. 1.

II. Can the husband and wife join as plaintiffs? Such was the law prior to No. 140, Acts 1884, as held in *Smith v. Fitzgerald*, 59 Vt. 451; it is urged that by section 2 of that act the law was changed, and that an action *quare clausum* for trespass upon the wife's land must be brought in her name alone; such might be the result if the property was held to the sole and separate use of the wife, and the husband had no marital rights therein. It is unnecessary, however, for us to pass upon the question, for if the property in the case at bar was not held to the sole and separate use of the wife, the husband was properly joined. It does not appear from the record whether it was so held or not, for she may have acquired it during coverture by gift from her husband. If she did, the action was properly brought. As we cannot presume error, we must sustain the ruling of the court below.

QUESTIONS OF EVIDENCE.

III. 1. The plaintiffs claim that they and the grantors in their chain of title had occupied the close in question to the fence on what is called the "plum tree line," and claimed title to the land by deed, and by adverse possession. John Nichols, a witness, called by the plaintiffs, who formerly owned and occupied the plaintiffs' premises, testified under exception that when he bought the place he understood from the description in the deed that the fence marked the line of his land. The defendant insists that the understanding of the witness was not admissible; to acquire title by adverse

possession it is necessary that the party occupies the land claiming it, and we think the understanding of where the line of his land was, in connection with his testimony relating to the occupation of the land, and that he claimed it, was admissible. We infer, if necessary, that there was testimony in the case tending to show both the occupation of, and claim to, the land. His understanding of where the line was was material; he would be more likely to occupy the land to the line where he understood it to be than otherwise, and we see no objection to the testimony showing what his understanding was in respect to it.

2. There was no error in admitting the testimony of William Fort. He, with his wife, was in possession of the premises now claimed by the plaintiffs, and his testimony tended to show that he occupied and claimed the premises to the line as now claimed by them. Judevine was then claiming a portion of the premises, and the testimony of the witness Fort tended to show that he, the witness, upon the premises, made claim to the land as far as the line now claimed by the plaintiffs. What he said to Judevine upon the occasion testified to, in making known his claim and the extent of it, was legal evidence, not of the truth of what he said, or, that he had any right to occupy as far as the line, but that he, at the time, made claim to the land that was fenced in by the fence standing on the plum tree line. The testimony should have been limited to this latter fact; it does not appear but that it was. The fact that he claimed the land was competent to be shown, even if it necessarily involved what he, at the time, said. *Kimball v. Ladd*, 42 Vt. 747.

3. One Perley owned the plaintiffs' premises from January, 1870, until April, 1889, and Judevine owned the adjoining premises for several of the intervening years. The exceptions show that about the year 1876 Perley and Judevine, when owning the respective premises, had a contro-

versy in regard to the line in question. To settle the dispute, they agreed upon a certain line ; the agreement was reduced to writing and left with Mr. Hathaway, the town clerk. The contents of the written agreement was a pertinent question upon trial. No loss of it was shown, and the court ruled that parol evidence of its contents was not admissible. This agreement as to the division line was recognized by both Perley and Judevine as late as the year 1881.

The testimony of the witness Curtis, tending to show the statements of Judevine and Perley made in connection with what they were doing upon the land, was objected to. We cannot say that it was error in excluding the statements of Mr. Judevine, for it is not shown what they were ; for aught that appears, they may have been in favor of the defendant's claim and therefore not injurious to him, and they may have been wholly immaterial. The statements of Mr. Perley tended to show the contents of the written agreement which had been made between him and Judevine. The witness testified that Perley said he wanted the old post holes marked, that Judevine might die and some dispute arise about the corner, and that Judevine might disregard the agreement that he had made with him, and that he, Perley, would have the corner marked. This was testimony strongly tending to show that the plum tree line was the one that had been agreed upon by the written contract. This testimony had already been ruled inadmissible, and it should have been excluded. Perley's statements made at the same time, in relation to his having always occupied the land to the fence on the plum tree line, was inadmissible. While statements are sometimes admissible as showing what the party's then claim to the land may be, his declaration as to what he had done in the past with reference to the transactions, is not admissible.

4. The plaintiffs being properly joined as parties, the wife was a competent witness.

5. The testimony of the witness Taylor, which was objected to, was proper matter of cross-examination; he was called by the defendant, and testified that Perley pointed out the boundary of his lot. The plaintiff had a right in cross-examination to ask the witness what Perley said about the boundary of the lot when pointing it out.

6. One Johnson, called by the defendant, testified that when he worked for Judevine he piled lumber belonging to Judevine upon the lot in dispute. We understand the cross-examination, which was objected to by the defendant, had reference to the matter of this same lumber and its being piled there, and was therefore a proper matter of cross-examination.

7. The question as to the testimony of the witness Pike was waived.

8. The cross-examination of the defendant was objected to, upon the ground that it put into the case the declarations of the plaintiff husband in his own favor. There was no error in the cross-examination. The plaintiffs had a right to examine the defendant upon any material matter in the way of cross-examination, whether he had testified upon the point or not; and they had a right to show that the defendant knew that the plaintiffs, at the time in question, made claim to the premises to the plum tree line, and this was the effect of the testimony. It should not have been admitted to establish the fact of where the line was located, but to show that the plaintiffs claimed the premises in dispute, as it was a material question whether they claimed to occupy the land adversely.

9. The defendant claims that the plaintiffs were permitted to give testimony in rebuttal relating to certain measurements from the plum tree line to certain corners, for the purpose of showing that certain trespasses were upon land which the plaintiffs claimed, and also the testimony of their brother George that he had never seen Judevine's man mow

the disputed tract, nor Mr. Pike tear down the fence, and also certain testimony of the plaintiff Simeon as to the condition of the tract in question when the place was deeded to his wife, and as to certain other measurements. The defendant insists that none of this testimony was in rebuttal. It was admitted not in the exercise of discretion, but as a matter of strict legal right. It is true the exceptions show that the plaintiffs in their opening had put in testimony tending to show certain distances and places claimed to have been trespassed upon, and the kind and character of the trespasses and their occupancy of the disputed tract, etc. While the testimony objected to may have been in the same line as that given by the plaintiffs in their opening, it does not appear from the record that it was not strictly in rebuttal of what some of the defendant's witnesses had testified to. There is no recital of the testimony given by the defendant and his witnesses upon these points, and we cannot say, therefore, that there was error in admitting the testimony in question.

10. The record is not full enough to enable us to determine whether there was any error in respect to the testimony of the plaintiff Simeon in regard to the application of Eldred to the selectmen; no error appears. This disposes of the questions of evidence which have been made in argument.

IV. The fourth point in the brief for the defendant is, that the charge as given upon the subjects noted upon page ten of the exceptions was not warranted by the facts. The exceptions stated on page ten are to the refusal of the court to charge in accordance with the requests, and to the charge as given upon the points covered by the requests. These questions are not considered, as no copy of the requests nor the charge has been furnished us.

V. The motion for a judgment at the close of the plaintiffs' evidence was waived as the defendant introduced evidence subsequently, and as the motion to order a verdict at

the close of all the evidence was based upon the misjoinder of parties, that question has already been disposed of adversely to the defendant.

The defendant filed a motion in arrest of judgment, upon the ground that the declaration did not sufficiently describe the locus in quo, and cites in support of this claim *Davis v. Judge*, 44 Vt. 500. That was an action of ejectment for the recovery of the possession of land, and involved the question of title. In such actions it is necessary to describe the premises with the particularity stated in the opinion in that case; but in an action of trespass *quare clausum*, it has been held in this state, *Rice v. Hathaway*, Bray. 231, that the premises were well described in the following words—"The close of the plaintiff situate, lying and being in St. Albans." The premises in this case are described as "the plaintiff's close, situate in the town of Hardwick," and also as a part of lot No. 3 in the ninth range of lots, with a reference to the deed to the plaintiff Sarah, recorded in book 16, page 361. We think this description, under the authority of the case cited, is good.

VI. The sixth point made in defendant's brief it is unnecessary to consider, in view of the holding upon the question of parties.

Judgment reversed and cause remanded.

Rowell, J., being absent in county court, did not sit.

CHARLES W. SCOTT

v.

SCHOOL DISTRICT NO. 9, IN WILLIAMSTOWN.

OCTOBER TERM, 1894.

Statute of limitations. Failure of former suit as replication. School district warning. Authority of prudential committee to employ himself. Ratification.

1. A replication to the statute of limitations setting forth that a previous suit was seasonably begun, but that the writ in such suit was not duly served, should allege that such failure of service was due to unavoidable accident or to the fault or neglect of the officer serving the same.
2. Nor is it enough to allege that the former suit was abated for defective service and the present suit brought within a year from such abatement. It must further appear that the cause of the defective service was within the statute.
3. It is no excuse for a defective school district warning that similar warnings had been used for many years.
4. The prudential committee of a school district cannot employ himself as a teacher, and cannot recover from the district upon a *quantum meruit* for services so rendered.
5. But if he actually teaches the school, and regularly keeps and returns to the town clerk his school register, and upon the strength of it the district receives and applies its portion of the public money, that will amount to a ratification of his contract and he may recover.

Assumpsit. Pleas, the general issue and statute of limita-

tions. Heard at the March term, 1893, Washington county, TYLER, J., presiding, on demurrer to the plaintiff's replication to the plea of the statute of limitations. Demurrer overruled, and replication adjudged sufficient. The defendant excepted, and by stipulation of parties it was agreed that the exceptions might lie, and the case proceed without prejudice to the exceptions.

The defendant being thereupon permitted to plead over plead the general issue, and a trial was had by the court. Upon the facts found by the court, judgment was rendered for the plaintiff for the sum claimed in the specifications and interest and costs. The defendant excepts.

The plaintiff resided in school district No. 9, in Williamstown. At the annual school meeting held in March, 1884, he was elected prudential committee of that district, but it was subsequently found that the warning for that meeting was defective, and he was duly appointed prudential committee by the selectmen of the town.

In September, 1885, another school meeting was held under the following warning :

"The legal voters of school district No. 9, in the town of Williamstown, are hereby notified to meet at schoolhouse in said district on the 18th day of September, 1884, at 1 o'clock in the afternoon, to consider and act on the following propositions :

"1. To choose a moderator to govern said meeting.

"2. To see if the district will vote to sustain a school or schools in said district, and to fix the time for the commencement of the terms thereof and the length of such terms.

"3. To see if the district will vote a tax upon the grand list to defray the expense of such school or schools, or take other measures therefor.

"4. To transact any proper and necessary business."

At that meeting the district voted to sustain a school for eight weeks in the fall, which school should begin September 22, and to provide for the instruction of those who might wish to attend school in the winter in adjoining districts.

Pursuant to this vote the plaintiff hired a teacher who taught the fall school. Not being able, as he thought, to provide for the instruction of the scholars in adjoining school districts, he determined, after some inquiry, to have a school in district No. 9, and did, in fact, teach a winter term of twelve weeks, boarding himself, and charged one dollar and twenty-five cents per day therefor. Before commencing his school the plaintiff was duly examined and licensed as a teacher. He kept the school register properly, and duly returned it to the town clerk's office. The parents in the district sent their scholars to school without objection, and the district drew the public money upon the attendance of scholars that term.

Before beginning his school the plaintiff made some repairs upon the schoolhouse, and provided some fuel for which he charged two dollars and fifty cents. At the end of the term he drew an order, payable to himself, for the amount due him for services in teaching the school and for said two dollars and fifty cents, and presented the same to the treasurer of the district for payment. Payment was refused, and the treasurer made him a tender of two dollars and fifty cents, which the plaintiff declined.

The defendant offered evidence tending to show that all the children in the district could have been instructed in other districts, and that the parents were willing to send them there. This evidence was excluded as immaterial, to which the defendant excepted.

The court held, as matter of law, that no article in the warning for the meeting of September 18, 1885, authorized the vote relative to having the scholars of the district taught in adjoining districts, and that notwithstanding the action of the district at that meeting, it was the duty of the plaintiff to provide a school in the district for the winter term, and that he was entitled to a reasonable compensation for his services in teaching the same; and since the defendant offered no

evidence in respect to the value of the plaintiff's services, the court held that under the common counts the plaintiff might recover the items charged in the specifications.

The defendant offered evidence tending to show that the district had used this form of warning in respect to having scholars instructed out of the district for eight or nine years previous, which evidence was excluded, under the exception of the defendant.

Edward W. Bisbee for the defendant.

The replication was insufficient. It must set forth all the facts necessary to bring the case within the exception of the statute. This replication does not show that the first suit failed without the fault of the plaintiff. *Poland v. Railroad Co.*, 47 Vt. 77; *Stephen, Pl.*, p. 333; *Phelps & Bell v. Wood*, 9 Vt. 399; *Spear v. Curtis*, 40 Vt. 59; *Hayes v. Stewart*, 23 Vt. 622.

The plaintiff could not employ himself as a teacher. *Judevine v. Hardwick*, 49 Vt. 180; *Davenport v. Johnson*, 49 Vt. 403.

W. A. & O. B. Boyce for the plaintiff.

ROWELL, J. The replication to the statute of limitations is demurred to. The replication seeks to bring the case within the statute that if, in an action commenced within the time limited, the writ fails of a sufficient service or return by unavoidable accident or by fault or neglect of the officer to whom it is committed, or is abated, the plaintiff may commence a new action for the same cause within a year; and it alleges, in effect, that this plaintiff seasonably commenced a former action for the same cause, and that the writ therein was served on the defendant only fifteen days before the return day, and that for that reason the defendant, being a corporation and therefore entitled to at least

thirty days' notice, the county court dismissed the action on motion, to which the plaintiff excepted, but as he did not file his exceptions in time, the judgment became final, and that this action was commenced within one year thereafter.

The replication is not good as constituting an answer to the plea on the ground of a failure of sufficient service of the writ in the former action, for it does not allege that such failure was by unavoidable accident, nor by fault or neglect of the officer to whom the writ was committed, as was necessary, to bring the case within the statute.

Nor is the replication good as constituting an answer to the plea on the ground of abatement of the former action, for the abatement was caused solely by reason of the failure of service, and it would be illogical to give the abatement greater effect as an answer to the plea than is given to the thing that alone caused the abatement, such thing itself being, when occasioned as mentioned in the statute, substantive ground for allowing another action to be brought.

The offer to show that for eight or nine years the district had used this same form of warning in respect to having scholars instructed out of the district, was properly excluded. The statute required that warnings for school district meetings should specify the business to be transacted or question to be considered at such meetings. This warning contained nothing upon the subject of having scholars instructed out of the district, and usage could not supply the defect. The powers of the district being wholly statutory, they could not be enlarged nor diminished by proof of usage. 1 Dillon's Municipal Corp., 2d ed., 356. Abuses of power and violations of rights derive no sanction from time nor usage. *Hood v. Mayor of Lynn*, 1 Allen, 103.

The vote to have the scholars instructed out of the district being void, the plaintiff, as prudential committee, was at liberty to "appoint and agree with a teacher to instruct" a school in the district; and the question is whether he could

himself instruct the school and recover for it on the *quantum meruit*. As said in *Brown v. School District*, 55 Vt. 43, there are cases in this state that seem to indicate that agents and officers of corporations have authority to pledge the credit of the corporation to one another; but after a review of some of the cases the true rule is there said to be that a committee may do by one of its members what it has a right to do by all, and that for all things furnished or done by one or all recovery can be had on the *quantum meruit* or *valebant*, and that it is not understood to have been decided by this court that a committee with authority only to contract have power to enter into agreements with themselves. The case of *Langdon v. Castleton*, 30 Vt. 285, not referred to in *Brown v. School District*, comes nearer to holding that than any other, perhaps. There the plaintiff was agent of the defendant town to prosecute and defend suits in which the town was interested, and being himself a lawyer, he prosecuted a suit in that capacity, and it was held that he could recover for his services and disbursements therein. The question is not discussed in the opinion, the court merely saying that it saw no reason why the plaintiff was not legally entitled to be paid, and that such had been the general understanding and practice in such cases. But the statute concerning the powers of such agents is different from the statute concerning the powers of prudential committees of school districts in respect of hiring teachers. Such agents are chosen, to use the language of the statute, "to prosecute and defend suits in which the town is interested." This language does not in terms, nor in effect, we think, restrict the authority of the agent to contracting for legal services, but leaves him at liberty to perform them himself if competent. It has always been quite the practice for towns to elect lawyers as such agents, because they could act in the double capacity of agent and lawyer, and thereby make it cheaper and better for the

town. But the statute concerning the authority of prudential committees of school districts was much more restrictive. Its language was, "shall appoint and agree with a teacher to instruct the school, and remove him when necessary." This confined their authority to appointing and agreeing; and as their official power in this regard was fiduciary, the case would seem to fall logically within the principle that it is against public policy to allow one standing in such a relation to contract with himself concerning the subject of his trust; and when we consider that it was the duty of such committees to remove a teacher when necessary, the case all the more clearly falls within that principle, for it is fundamental that a man shall not be a judge in his own case, and that doctrine is not alone applicable to strictly judicial officers, but to everyone who acts in a judicial capacity, as a prudential committee did when he sat to determine whether it was necessary to remove a teacher or not. The law of this subject is so well settled and so familiar that we deem the citation of authority unnecessary, but those desirous of looking into the books will find an instructive case in *Pickett v. School District*, 25 Wis. 551; 3 Am. Rep. 105. That case goes much further than this court has gone, and would prohibit recovery in many cases where we permit it; but the ground and reason of the law is there well stated. We hold, therefore, that the plaintiff had no authority to teach the school himself.

The parents in the district sent their children to school without objection, and the plaintiff kept the school register properly and duly returned it to the town clerk's office, and the district drew public money according to the attendance that term; and the question arises whether by reason of these things, or of any and which of them, the district became liable to the plaintiff for his services. If it did, it was upon the ground of assent and ratification.

It is said that when work done for a corporation without

complete legal authorization is for a corporate purpose and beneficial to it and the price reasonable, strong evidence of the assent of the corporation is not required, but that such assent must be shown; and that ratification, whatever its form, must be by the principal or by authorized agents. 1 Dillon Municip. Corp. ss. 464, 465, 4th ed. The work in question comes within this proposition, in that it was done without such authorization, was for a corporate purpose, and, presumably, beneficial to the corporation; and we think it further comes within it in that it was assented to and ratified by an authorized agent. By reason of the plaintiff's services in teaching the school and properly keeping and seasonably returning the school register, the district became and was entitled to a proportionate share of the public moneys, which share the district received in due course, and it was, presumably, as the statute provided it should be, paid over to the treasurer of the district, who was, by statute, fully authorized to accept and receive it, which made his act in this behalf, in legal effect, the act of the district; and so the question is, had the district, by authorized corporate action, accepted and received this money, would it thereby have made itself liable to the plaintiff for his services? We think it would have, on the ground that if one accepts, or knowingly avails himself of, the benefit of services performed for him without his authority, the fruits of which he can reject, he shall be held to pay therefor a reasonable compensation—a principle as applicable to a corporation when the services are performed in and about a corporate business as to an individual. One cannot, in such a case, accept in part and reject in part. If he accepts in part he thereby ratifies and confirms the whole.

Judgment reversed, demurrer sustained, replication adjudged insufficient, and cause remanded.

FRANK H. VITTUM v. ORAMEL C. ESTEY.

OCTOBER TERM, 1894.

When refusal to perform contract may justify bringing of suit before time for performance. Variation of written contract by parol.

1. Defendant agreed in writing to deed the plaintiff certain real estate on or before November 1, 1893, for one thousand and twenty-five dollars, of which fifty dollars was then paid. On October 30, 1893, plaintiff tendered defendant nine hundred and twenty-five dollars, claiming that he had agreed to throw off fifty dollars for cash, and demanded a deed, whereupon defendant replied that he should be glad to deed, but that his father refused to deed, and that was the end of it. Plaintiff brought this suit for breach of contract October 31, 1893. *Held,*
 - (a.) That the option to convey on or before November 1 was the defendant's, and that he was under no obligation to convey before that date.
 - (b.) That while an absolute refusal to perform might justify the plaintiff in treating the contract as at an end, and bringing his suit before the time for performance had elapsed, this was not such an absolute refusal.
 - (c.) Since it appears from the plaintiff's own testimony that the agreement to discount the fifty dollars was made before the execution of the written contract, that fact cannot be shown by parol.

Assumpsit. Trial by jury at the May term, 1894, Windsor county, THOMPSON, J., presiding. At the close of the plaintiff's evidence the court directed a verdict for the defendant.

The agreement upon which the plaintiff's suit was predicated was as follows:

“CAVENDISH, VT., October 7, 1893.

“Received of Frank Vittum, by hand of M. S. Buck, fifty dollars, in part payment for the Cady farm, so called, where I now reside in Cavendish, which I agree to convey to the said Frank Vittum by a warranty deed in common form, for one thousand and twenty-five dollars, the purchase money for said farm and certain personal property, on or before November 1, 1893.

O. C. ESTEY.

“Attest—M. S. BUCK.”

Gilbert A. Davis for the plaintiff.

The plaintiff may rely upon the refusal of the defendant to perform, and bring suit at once. *Holmes v. Boyce*, 65 Vt. 319; *Green v. Hulett*, 22 Vt. 188; 2 Smith's Lea. Cas., 36; *Frost v. Knight*, L. R., 5 Ex. 322, 7 Ex. 111; *Beutis v. Thompson*, 42 N. Y. 246; *Burge v. Koop*, 48 N. Y. 225; *Treer v. Denton*, 61 N. Y. 492; *Gray v. Green*, 16 N. Y. 334; *Platt v. Woodruff*, 61 N. Y. 374; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286, 293; *Fox v. Kilton*, 19 Ill. 519; *James v. Adams*, 16 W. Va. 245, 266; *Dingley v. Ober*, 11 Fed. Rep. 373; *Halloway v. Griffith*, 32 Iowa 409; *McCormick v. Bascel*, 46 Iowa 235; *Davis Sewing Machine Co. v. McGinnis*, 45 Iowa 538.

W. W. Stickney and *J. G. Sargent* for the defendant.

The action was premature. The refusal to perform was not an absolute one. *Daniels v. Newton*, 114 Mass. 530; *Nason v. Holt*, Id. 541; *Dingley v. Oler*, 117 U. S. 490.

The written contract could not be varied by parol. *Dana v. Hancock*, 30 Vt. 616; *Ide v. Stanton*, 15 Vt. 685.

ROWELL, J. This is an action to recover damages for the anticipatory breach of a contract, whereby the defendant

agreed to convey to the plaintiff a farm and certain personal property on or before November 1, 1893, at and for the price of one thousand and twenty-five dollars. Plaintiff paid down fifty dollars, and claimed that the defendant orally agreed to throw off fifty from the balance for cash instead of a mortgage. On October 30, 1893, the plaintiff's attorney, in his presence, tendered to the defendant nine hundred and twenty-five dollars, and demanded a deed at once. The defendant himself was willing and anxious to deed, but he said, "You know how it is, father owns the farm with me; it is deeded to us both, and he won't join in the deed; I can't deed." The attorney replied that that made no difference to the plaintiff; that the plaintiff bought of him, and that there was the balance of the money. The defendant said that the amount of money was all right, but that he could not deed and that was the end of it, or that was all there was of it, or something like that. Thereupon the attorney put the money into the hands of a bystander, and told the defendant that the money was ready for him any time he saw fit to deed, and told the bystander to accept a deed and give the defendant the money.

Nothing further appears to have passed between the parties, and on the next day, October 31, this suit was brought, and the defendant claims that it was prematurely brought, while the plaintiff claims that by the contract he had a right to demand and have performance on the 30th, but if not, that the defendant renounced the contract on that day, and that by bringing his suit the next day the plaintiff treated that renunciation as a breach of the contract, as he well might, and that therefore the suit was not prematurely brought.

As to the contract giving the plaintiff the right to demand and have performance on the 30th, we think it did not. The option to convey on or before November 1 was the option of the defendant, who was the party to convey, and not the

option of the plaintiff, who was the party to receive the conveyance.

As to a breach by renunciation, it is settled law in England and in many jurisdictions here, that when one party to a bilateral contract, before the time of performance on his part has arrived, repudiates the entire contract or a part of it that goes to the whole consideration, and declares that he will no longer be bound by it, the other party may, if he pleases, act upon the declaration and treat the contract as thereby broken and at an end for all purposes except for bringing a suit upon it, which he may bring at once without waiting for the time of performance. Or, to put it as Lord Blackburn does in *Mersey Steel & Iron Co. v. Naylor, Benzir & Co.* 9 Appeal Cases, 434, 442, the other party may say :

“You have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but will treat you as having put an end to it, and if necessary will sue you for damages ; but at all events, I will not go on with the contract.”

But declarations that do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a renunciation of it. *Dingley v. Oler*, 117 U. S. 490 ; *Johnston v. Milling*, L. R. 16 Q. B. D. 460.

Now when we consider the defendant's refusal, it does not appear to be of that character. He did not say that he would not deed in any event. He was willing to deed, and refused only because his father was not willing. His refusal amounted to no more than saying, “I will deed if father will, but as he refuses, I cannot. If he changes his mind, I will deed, for I am anxious to perform.” The plaintiff seems to have so understood it, for by his tender he left the contract open, and gave to the defendant further time and opportunity to perform if his father should, after all, as he might, conclude to join in a deed. It follows, therefore, that the plaintiff does not bring his case at all within the rule for

which he contends; hence, if we were to adopt it, it would profit him nothing.

Concerning the claimed agreement to throw off fifty dollars from the contract price, the plaintiff contends that it excused him from tendering more than he did, because it was made after the written contract was executed, and that performance or readiness to perform according thereto is as available to him as performance or readiness to perform according to the written contract. But the plaintiff's testimony does not show that that agreement was made after the written contract was executed, for he expressly said on cross-examination that it was made before the day on which that contract was executed, but that it was talked about afterwards. If it antedated that contract, it could not be received to vary its terms. We are not called upon to say what effect it would have if it postdated it.

Judgment affirmed.

Taft, J., dissents, thinking that the defendant's declarations did amount to an absolute and unqualified refusal to perform the contract, and that the plaintiff treated the contract as thereby broken and at an end by bringing this suit.

J. DANA CULVER v. TOWN OF FAIR HAVEN.

OCTOBER TERM, 1894.

Resurvey of highway under R. L., s. 2920. Recommitment of report of commissioners.

1. Under R. L., s. 2920, the selectmen may resurvey a highway whose boundaries and termini cannot be determined, provided the fact of the original survey be established. *Trudeau v. Sheldon*, 62 Vt. 198, explained.
2. Commissioners appointed by the county court upon an appeal from the action of the selectmen, if they find that the original boundaries cannot be determined, should then proceed with the other questions in the case, and having failed to do so, their report will be recommitted.

This was a petition to the county court for the appointment of commissioners to review the action of the selectmen of the town of Fair Haven in resurveying a highway under R. L., s. 2920. Heard at the March term, 1894, Rutland county, MUNSON, J., presiding, upon the report of commissioners and exceptions of the petitioner thereto. The court sustained the exceptions and dismissed the petition. Both parties except.

The petition alleged that two of the selectmen of the town of Fair Haven, professing to act under R. L., s. 2920, but wholly without application therefor, and without the existence of any facts which would give them jurisdiction so to act, made a pretended resurvey of the east line of Main street in the village of Fair Haven, and thereby so altered

the line of the original highway as to include within its limits certain land of the petitioner; that the said selectmen awarded the petitioner no damages therefor; that there was no original survey of such highway which had been preserved, and no terminations or boundaries which could now be ascertained.

The commissioners reported that said highway was originally surveyed April 10, 1788, and was, at the point in question, laid out six rods wide. That according to the original description the survey began at the bridge on the west side and the north end thereof; that the bridge at the starting point of the survey had been changed, and that at the time of the action of the selectmen the location of said bridge and the location of the eastern line of the highway in question could not be ascertained; nor could it be ascertained by the commissioners and located with any degree of certainty.

The commissioners did not attempt to resurvey the said easterly line, nor to make any award to the petitioner in the matter of damages.

Joel C. Baker for the petitioner.

Since it was impossible to determine the location of the highway according to the original survey, the selectmen had no jurisdiction in the premises. *Trudeau v. Sheldon*, 62 Vt. 198.

William H. Preston for the defendant.

TAFT, J. The selectmen of Fair Haven resurveyed a highway under the provisions of s. 2920, R. L., which reads as follows:

“If the survey of a highway has not been properly recorded, or the record preserved, or if its terminations and boundaries cannot be ascertained, the selectmen may resur-

vey the same, and make a record thereof in the town clerk's office ; but fences or buildings erected or continued thereon for more than fifteen years shall not be removed, or the lands enclosed taken for the highway, without compensation as in other cases of altering highways."

The petitioner, under No. 15, Acts 1886, took an appeal to the county court, alleging that he was the owner of land included in the resurvey ; that it had been enclosed for more than fifteen years, and that no damages had been allowed him for the land so taken ; and further alleging that the public good, or the convenience of individuals, did not require a resurvey of said highway. Commissioners were appointed by the county court, who reported that the highway was originally surveyed and laid out April 10, 1788, including in their report an accurate description of the survey, with its termini and courses. The commissioners further reported that the boundary of the highway at one terminus could not be ascertained, nor can it now be ascertained and located with any degree of certainty ; that the resurvey of the east line of the highway was not, nor was it intended by the selectmen to be, a reproduction of the old or original survey of the highway at that point. This in substance is all that the commissioners report in relation to the case before them. There are no findings upon the various questions presented by the petition—whether the petitioner was the owner of land included in the resurvey, whether such land, if any, had been enclosed for more than fifteen years, whether the petitioner had sustained damages, and if so, how much, etc. It is not stated in the report why the commissioners did not report fully upon the case before them, but we infer that it was for the reason that having found the lines of the original survey could not be reproduced, nor ascertained and located as they were when first surveyed in 1788, they were of the opinion that the selectmen had no jurisdiction nor legal authority to make a resurvey. This is the view taken by the petitioner's counsel, who argues that for that reason the

selectmen had no jurisdiction; that the whole proceedings are void, citing *Trudeau v. Sheldon*, 62 Vt. 198. That case simply holds that "the fact that a survey has been made must appear to give the selectmen jurisdiction to make a resurvey." There are three instances in which a resurvey of a highway can be made—if the survey has not been properly recorded, if the record has not been preserved, if its terminations and boundaries cannot be ascertained. It is evident from the report that the survey was recorded and the record preserved, so that in neither of these respects could a resurvey be made; but the commissioners report that at the time of the action of the selectmen the boundary of the highway at the point of beginning could not be ascertained, neither could it at the time of the hearing before them. Thus the commissioners found the very fact that gave the selectmen jurisdiction to make a resurvey of the highway, viz., that "its terminations and boundaries cannot be ascertained." To say that the word resurvey as used in the statute means nothing more than to locate the lines of the boundaries in their original location is to give the word too narrow a construction. If the terminations and boundaries can be ascertained according to the original survey, there is no need of a resurvey. Under this section of the statute to resurvey a highway means to re-locate it, and the lines may be where originally located and may be elsewhere. Whether the lines by the resurvey are where the lines of the original survey were, can in no case be known, for the location of the latter cannot be ascertained. When the fact that the terminations and boundaries of the highway could not be ascertained, was found by the commissioners, it was their duty to investigate the various questions presented by the petition and evidence and report the facts found by them; such facts as whether the petitioner's land was taken by the resurvey, whether, if any, it had been enclosed for more than fifteen years, the damages sustained by the petitioner, if any, etc. That the

commissioners may investigate and report such facts it is necessary that the report be recommitted to them, and for that purpose the

Judgment is reversed and cause remanded.

LLOYD AND CULVER v. TOWN OF FAIR HAVEN.

OCTOBER TERM, 1894.

Taking of land for highways. As of what date damages should be assessed.

The selectmen took the land of the petitioners for a highway, and made an award of damages. The petitioners applied to the county court for the appointment of commissioners, and subsequently, pending those proceedings, built upon the land taken. *Held*, that they were entitled to damages for the taking of their land in the condition and situation it was at the time of the proceedings before the selectmen.

Petition to the county court for the appointment of commissioners to revise the action of the selectmen in the altering of a highway. Heard upon the report of commissioners and exceptions of the petitioners thereto at the March term, 1894, Rutland county, MUNSON, J., presiding. The court overruled the exceptions, accepted the report, established the highway, and confirmed the award upon the subject of damages. The petitioners except.

The petition averred that the selectmen for the town of

Fair Haven had altered a public highway ; that in the making of such alterations the lands of the petitioners were taken ; that they were dissatisfied with the action of the selectmen in the making of the alterations, and also with the damages awarded.

The commissioners reported that the highway in question was Main street, in the village of Fair Haven, and that the same had been a public highway for many years. Originally said highway had been laid out six rods wide, but in process of time it had become impossible to determine exactly where the boundaries were, and the owners of lots upon the east side of said highway, which ran nearly north and south, had not professed to erect their buildings upon the line of the street. The point in controversy was between the block of Hughes & Owens upon the north, and Knight upon the south. In 1879 a large part of the buildings between these two blocks were destroyed by fire, and the land owners in erecting their new buildings built them somewhat nearer the street than they had previously been, and substantially upon the line of the Knight block. If the line of this block was extended to Hughes & Owens' block it would strike the south side of the building, about eight feet east of the southwest corner. In 1892 most of the buildings between these two blocks were again destroyed by fire. It seemed desirable to some of the land owners and many of the residents in Fair Haven that the buildings to be erected at this point should conform to a straight line running from the southwest corner of the Hughes & Owens block to the northwest corner of the Knight block. The land owners did not, however, concur in this view, and began the erection of buildings for the most part some six or eight feet farther west upon what they claimed to have been the original east line of the street. Thereupon the selectmen widened the street at that point so that the east line would be a straight line drawn from the

Hughes & Owens block to the Knight block as above indicated, and awarded damages, among others, in the sum of twenty-five dollars to the petitioner Culver, and in the sum of one hundred dollars to the petitioner Lloyd. The present petition was begun to correct the action of the selectmen.

In the decision of the selectmen in widening the street most of the land owners acquiesced, and proceeded to erect their buildings upon the line as thus established. The petitioners, however, proceeded to erect their buildings upon the line which they claimed was the true east line of the street. For the purpose of preventing this the selectmen of Fair Haven began proceedings in chancery, and obtained a temporary injunction enjoining the petitioners from erecting their buildings further west than the line as established by the survey of the selectmen; but upon the answer of the petitioners this injunction was dissolved.

The commissioners found that in view of the use of the street at that point, the alteration made by the selectmen was required by the public necessity and convenience, and that the damages awarded by the selectmen were ample, if they were to be determined with reference to the situation and condition of the property at the time the award was made.

J. C. Baker for the petitioners.

The right of the public in the lands taken is not fixed until final judgment. Up to that time the selectmen may, at their option, abandon the whole proceeding. Therefore, the damages of the land owners should be determined as of that date. *Stacy v. Railroad*, 27 Vt. 39; *State v. Graves*, 19 Md. 351; Dill., Mun. Cor., s. 608; Elliott, Streets and Roads, 209, 210.

The land cannot be said to be taken until such final judgment, and if it be abandoned before then, no compensation can be recovered. *Stiles v. Middlesex*, 8 Vt. 436; *Fox v.*

Railroad, 31 Cal. 538; *Taft v. Pittsford*, 28 Vt. 286; R. L., ss. 2942, 2943; *In re Railroad*, 4 Hun. 311; *Railroad v. Nesbit*, 10 How. 395; *New York v. Mopes*, 6 John Ch. 48; *Gas Light Co. v. Syracuse*, 78 N. Y. 56; *In re Furman Street*, 17 Wend. 658; *In re Wall Street*, 17 Barb. 639; *Gilman v. Tucker*, 128 N. Y. 190; *Ins. Co. v. New York*, 134 U. S. 598; *Railroad v. Minnesota*, 134 U. S. 418; *Yickwo v. Hopkins*, 118 U. S. 356.

W. H. Preston for the defendant.

TAFT, J. The only question in this case relates to the appraisal of damages to land taken for highway purposes, under s. 2940, R. L. The highway was altered by the selectmen, who appraised the damages, and the petitioners applied to the county court for the appointment of commissioners to rehear the questions passed upon by the selectmen. It is upon the report of the commissioners that the question before us arises. After the proceedings before the selectmen and their award of damages, the petitioners built upon their land which had been taken in altering the street, and now claim that damages should be appraised as of the time the commissioners' report is accepted and the final orders made in the county court. We hold that the petitioners are entitled to such damages only as they sustained by the taking of their land in the condition and situation it was in at the time of the proceedings before the selectmen. When condemnation proceedings are begun, in case it is proposed to take land for a highway, and the selectmen make an award of damages, the land owner thereafter stands very much like a purchaser *pendente lite*. After the proceedings before the selectmen and appraisal of his damages, the land owner has notice that his land may be taken, in fact that it has already been taken, and that it will remain devoted to the use of the public, unless by petitioning the county court he secures a reversal of

the action of the selectmen, and if he builds upon it during the proceedings it is at his own peril. To permit him to build upon the premises after proceedings are begun, and allow him to recover the value of the buildings thus erected, might make the premises so valuable that the town might not wish, and could not afford, to take the land. There is no injustice in holding that when condemnation proceedings are begun, the premises must remain in *statu quo* until the proceedings are terminated. This rule violates no principle of constitutional law nor legislative provision. The judgment below awarded the petitioners damages in accordance with the principle herein stated, and that

Judgment is affirmed with the same orders, dating from January 18, 1895.

ALFRED H. LADD v. TOWN OF GRAND ISLE.

OCTOBER TERM, 1894.

Verdict properly directed upon the evidence. Plaintiff bound to know defendant not party to contract.

The defendant town, having in contemplation the construction of a bridge, contracted with the plaintiff to take rubble from his ledge at a certain price. The town did not construct the bridge, but subsequently contracted it, and the contractors took stone from the plaintiff's ledge and settled with him for the same in part. *Held*, that a verdict was properly directed for the defendant, for, under the circumstances of the case, the plaintiff was bound to know that the contractors in taking the stone were acting for themselves, and not as the agents of the town.

Assumpsit. Plea, the general issue. Trial by jury at the February term, 1893, Grand Isle county, THOMPSON, J., presiding. At the close of the evidence the court directed a verdict for the defendant. The plaintiff excepts.

H. C. Adams and F. W. McGettrick for the plaintiff.

Wilson & Hall and Jed P. Ladd for the defendant.

START, J. The plaintiff's evidence tended to show that in October, 1889, he made a verbal contract with the defendant, through its selectmen, by which he agreed to permit them to quarry and take rubble from a ledge on his land for the construction of a bridge from Grand Isle to North Hero; and that the defendant agreed to pay him five cents per cubic

yard for whatever rubble the selectmen should take for that purpose. The town did not construct the bridge ; but, subsequent to the making of the contract claimed to have been made with the plaintiff, it made a contract with the firm of J. A. Chamberlin & Co., by the terms of which said firm agreed to construct the bridge. All the rubble taken from the plaintiff's ledge and used in the construction of the bridge was taken by Chamberlin & Co. ; and they paid the plaintiff seven hundred three dollars and ten cents during the progress of the work, in part payment for the rubble so taken, and the plaintiff, or his agent, gave receipts for the money so paid.

It appeared that before Chamberlin & Co. took the contract to build the bridge, they were importuned by citizens of Grand Isle to take the contract for forty thousand dollars, and they consented to do so, provided responsible citizens of the town would personally indemnify them against loss ; and thereupon a written contract was executed and delivered between the members of the firm of Chamberlin & Co. of the one part, and seventy-five citizens, including the plaintiff, of the other part, by which the plaintiff and other citizens agreed to indemnify and save Chamberlin & Co. from all loss by reason of taking the contract to build the bridge. This agreement was read over and signed by the plaintiff before any rubble was taken from his ledge.

On the tenth day of August, 1891, the plaintiff and the members of the firm of Chamberlin & Co. made a contract in writing, whereby the plaintiff gave them the privilege of quarrying stone from his ledge for the construction of the bridge. There was no evidence tending to show that in the construction of the bridge Chamberlin & Co. were the agents of the defendant town, or acted as such ; and it appeared from the uncontradicted evidence that in all that they did in the construction of the bridge, and procuring material therefor, they acted as independent contractors, and not as the ser-

vants or agents of the defendant. The plaintiff claimed that the rubble taken from his ledge was taken by Chamberlin & Co. as the agents or servants of the defendant, and that he was entitled to recover for the rubble so taken under his contract with the selectmen.

The court directed the jury to return a verdict for the defendant. In this there was no error.

By the contract between the plaintiff and the defendant's selectmen, the defendant was to pay for such rubble as the selectmen should take for the construction of the bridge. The selectmen did not build the bridge, nor did they take any rubble from the plaintiff's ledge for its construction. Chamberlin & Co. built the bridge under a contract to do so, but not as agents or servants of the defendant; and they took the rubble in question for its construction. The rubble taken by Chamberlin & Co. was not taken under circumstances that would justify the plaintiff in believing that it was taken by them as agents or servants of the defendant. The undertaking of Chamberlin & Co. was to build the bridge and furnish the material therefor for forty thousand dollars, and the plaintiff knew that such was their contract. Before any rubble was taken he read and signed the contract, by which he and other citizens of the town agreed to indemnify and save Chamberlin & Co. harmless from any loss that might accrue to them by reason of their taking the contract for the construction of the bridge. In this agreement the contract of Chamberlin & Co. is distinctly referred to. It is stated that "it is the desire of the parties of the second part that the parties of the first part sustain no pecuniary loss of any kind, under their contract with the town of Grand Isle to build a bridge between said Grand Isle and North Hero." The plaintiff having deliberately read and executed the contract containing this recital, he ought not to be heard to say that he did not know that Chamberlin & Co. had entered into a contract to build the bridge.

The town was not a party to this contract, signed by the plaintiff and other citizens. The plaintiff and other citizens were interested in having the bridge built, and, as an inducement to Chamberlin & Co. to take the contract, they agreed to indemnify them against loss; but the fact that Chamberlin & Co. were thus indemnified by citizens of the defendant town against loss, had no tendency to show that they were agents or servants of the defendant. The undertaking of Chamberlin & Co. with the defendant was an absolute undertaking to furnish material and build the bridge for forty thousand dollars. There was no evidence in the case that tended to show that the defendant ever released Chamberlin & Co. from this undertaking, nor that the relation that they sustained to the defendant ever changed from that of contractors to that of agents or servants of the defendant; and the plaintiff had no right to understand or believe that there was such a change. He received payments towards the rubble from time to time from Chamberlin & Co., and, during the progress of the work, made a written contract with them, whereby they were to take rubble from his ledge for the construction of the bridge. Under these circumstances the plaintiff cannot be heard to say that he believed, and was justified in believing, that rubble was being taken from his ledge by Chamberlin & Co. under his claimed contract with the selectmen. He had no right to assume that Chamberlin & Co. were the agents or servants of the defendant. His knowledge of Chamberlin & Co.'s relation to the work was such that he could not remain passive, and assume that he was delivering rubble under his contract with the defendant. His knowledge was such that he was put upon inquiry; and, if he did not know that Chamberlin & Co. were building the bridge upon their own credit, he ought to have known it. The knowledge that he had would have put any reasonably prudent man upon inquiry. By inquiry he could have learned that Chamberlin

& Co. had taken the contract to furnish the material and build the bridge ; but no inquiry was necessary. A prudent man, with his knowledge, would not be deceived or misled. He knew that, by the terms of his claimed contract with the selectmen, the defendant was to pay him only for such rubble as was used by the selectmen in the construction of the bridge ; he knew he had signed a contract to indemnify Chamberlin & Co. against loss that should accrue to them by reason of taking the contract to build the bridge ; he knew that Chamberlin & Co. were in charge of the work and taking rubble from his ledge ; that he was receiving pay for the same from time to time from them, and that during the progress of the work he made a contract in writing with Chamberlin & Co., by which they were to take rubble from his ledge for the construction of the bridge. Under these circumstances he was bound to know to whom, and upon whose credit, his rubble was being delivered ; and the law charges him with the knowledge that it was not being taken by the defendant, nor upon its credit.

The view we have thus taken of the facts confessedly within the knowledge of the plaintiff, renders it unnecessary to pass upon the questions raised upon the admission and rejection of testimony.

Judgment affirmed.

ORRIN MAGOON

v.

BOSTON & MAINE RD. CO. ET AL.

MAY TERM, 1894.

*Contributory negligence. Passing between stationary cars.
Exception to argument of counsel.*

1. One who attempts to pass between freight cars by climbing over the buffers is guilty, as a matter of law, of contributory negligence, although the cars have been unnecessarily left standing across a public highway for a long time, and although no engine is attached or in sight.
2. *Held*, that there was no evidence tending to show that the servants of the defendant in charge of the train knew or ought to have known the perilous position of the plaintiff in time to have prevented the injury.
3. That the defendant failed to blow the whistle, or ring the bell, or give some other warning of its intention to move the cars, did not excuse the plaintiff from due diligence on his own part.
4. If counsel transcends the right of argument it is the duty of the trial court to stop him; and if it omits to do so, that is tantamount to a ruling that the remarks are warranted, to which an exception will lie, without in terms asking and obtaining such ruling.
5. *Held*, that the judgment should be reversed upon the exception taken to the argument of plaintiff's counsel.

Case for personal injuries. Plea, the general issue.
Trial by jury at the February term, 1894, Orleans county,

ROWELL, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff was injured while attempting to pass over the buffers and draw bars between two freight cars standing upon a highway crossing in the village of Newport. He testified that the cars were standing there when he first came in sight of the crossing on his way down the street; that he stood beside them for some fifteen minutes before attempting to pass through; that he saw no employee of the defendant in charge of said cars, and neither saw nor heard any engine during all the time that he stood there; that both ends of the train, which consisted of some eight or ten cars, were visible, and that he could see a considerable distance down the track upon which the cars stood towards the south, but owing to a curve could not see a great way towards the north; that another person passed between the cars, and that he, being desirous to pursue his way, stepped back so that he might have a view of the track to the north as well as the south; that from the position in which he was standing he could see up the track a considerable distance, and that he neither saw nor heard any engine, and thereupon attempted to pass over the draw bars.

The remaining facts and the exceptions taken by the defendant sufficiently appear in the opinion.

Di keran & Young for the defendant.

The plaintiff was guilty of contributory negligence in attempting to pass between the cars. He was familiar with this crossing; knew that cars were frequently left standing upon it, but that they were always finally moved away. The fact that these cars had been standing there a long time made it all the more probable that they would be moved. *Indiana, Bloomington, etc., Rd. Co. v. Hammock*, 32 Am. & Eng. R. Cas. 129; *Renneker v. So. Car. Ry. Co.*, 20 S. C. 218, (18 E. & A. R. Cas. 149); *Simms et al. v. So.*

Ga. Ry. Co., 30 A. & E. Ry. Cas. 571-573; *Winn v. Lowell*, 1 Allen 177; *Int. & G. N. Rd. Co. v. Garcia*, 42 Am. & Eng. R. Cas. 121; *Artusy et al. v. Mo. Pac. Rd. Co.*, 37 Am. & Eng. R. Cas. 288; *Zimmermon v. H. & St. J. Rd. Co.*, 71 Mo. 476, (2 Am. & Eng. R. Cas. 191); *Nichols, Admr., v. L. & N. Rd. Co.*, 34 Am. & Eng. R. Cas. 37 and note; *Andrews v. Central Rd. Co.*, 45 A. & E. R. Cas. 171; *Lake Shore and Michigan Southern Rd. Co. v. Pinchin*, 112 Ind. 592, (35 A. & E. R. Cas. 383); *Dahlstrom v. St. Louis Rd. Co.*, 35 A. & E. R. Cas. 389; *Howard v. Kansas City R., etc., Co.*, 37 A. & E. R. Cas. 552; *Memphis & Ch. Rd. v. Copeland*, 61 Al. 376; *Stillson v. Hannibal, etc., Rd. Co.*, 67 Mo. 671; *O'Mara v. Canal Co.*, 18 Hun. 192; *Central Rd. Co. v. Dixon*, 42 Ga. 327; *Union Pac. Rd. Co. v. Adams*, 33 Kan. 427, (19 A. & E. R. Cas. 376); *Renner v. Northern Pac. Rd. Co.*, 46 Fed. Rep. 344; *Bird v. Flint & P. M. R. Co.*, 86 Mich. 79; *Corcoran v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 399, (49 A. & E. R. Cas. 387); *Atchison T. & S. R. Co. v. Plaskett*, 26 Pac. Rep. 401; *Bean v. Employers' Liability Assurance Co.*, 50 Mo. App. 459; *Chicago, Rock Island & Pac. Rd. Co. v. Hamilton Hanson*, 95 U. S. 697; *Louisville & Nashville Rd. Co. v. Crawford*, 44 A. & E. R. Cas. 568-571; *Cleary v. Philadelphia & R. Co.*, 140 Pa. St. 19.

There was no question for the jury, and the court should have directed a verdict. *Latremouille v. B. & R. Rd. Co.*, 63 Vt. 336; *Worthington v. Cent. Vt. Rd. Co.*, 64 Vt. 107; *Clark v. Rhode Island Elec. Lt. Co.*, 16 R. I. 465; *New Jersey Ex. Co. v. Nichols*, 33 N. J. L. 424; *Granger v. Boston & Albany*, 146 Mass. 276.

The argument of plaintiff's counsel was unwarranted; and furnishes matter of exception. *Perkins v. Burley*, 6 N. E. R. 818; *Bullard v. Boston & Maine Rd. Co.*, 64 N. H. 27; *Brown v. Swinneford*, 44 Wis. 282; *Coble v. Coble*,

79 N. C. 589; *Cleveland Paper Co. v. Banks*, 15 Neb. 20, (48 Am. Rep. 334).

Unwarranted statements in argument are *prima facie* prejudicial, and an exception will lie without any ruling of the court thereon. *Martin v. State*, 63 Miss. 505, (56 Am. Rep. 812); *Hillard v. Beattie*, 59 N. H. 462; *Tucker v. Henniker*, 41 N. H. 317; *Cross v. Grant*, 62 N. H. 676.

C. A. Prouty for the plaintiff.

The defendant had left its cars standing upon this highway crossing unnecessarily, and in violation of law. People had congregated at that point for the purpose of passing over the crossing, and some persons had already passed between the cars. Under these circumstances it was the duty of the defendant to give some warning to the public of its intention to move its cars. Not having done so, it is liable. *Burger v. Rd. Co.*, 112 Mo. 238; *Penn. Rd. Co. v. Kelley*, 31 Pa. St. 372; *Wilder v. Stanley*, 65 Vt. 145; *Grimes v. Louisville, etc., Rd. Co.*, 3 Ind. App. 573; *Young v. Detroit, etc., Rd. Co.*, 56 Mich. 430; *Denver, etc., v. Robbins*, 30 Pac. Rep. 261; *Philadelphia, etc., Rd. Co. v. Layer*, 112 Pa. St. 414; *McMahon v. Northern Cent. Rd. Co.*, 39 Md. 438.

A traveler on the highway who finds an obstruction therein may surmount it in whatever manner he best can, and it does not lie in the mouth of the one who has created the obstruction to say that he shall not incur whatever hazard may be necessary to overcome the same. *Mahoney v. Metropolitan Rd. Co.*, 104 Mass. 73; *Smith v. Railroad Co.*, 84 Ga. 198; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; *Young v. Detroit, etc., Rd. Co.*, 56 Mich. 430.

No engine was attached to this train. In all the time the plaintiff stood there, there was nothing to indicate to him that the defendant contemplated moving these cars. Before he attempted to pass through, the plaintiff endeavored to

satisfy himself that no engine was in the vicinity. Whether he ought to have seen the engine, which was in fact concealed from view by the two cars towards the north, was a question for the jury. In all the cases cited by the defendant, in which an attempt to pass between freight cars has been held contributory neglect, an engine was attached to the train, and the decision in every case is distinctly put upon that ground.

It has been frequently held that an attempt to pass between two cars is not contributory negligence where the plaintiff has a right to apprehend that he will not be injured in consequence. *Smith v. Railroad Co.*, 84 Ga. 198; *Balt. & Ohio Rd. Co. v. Fitzpatrick*, 35 Md. 32; *Klanowski v. Grand Trunk Ry. Co.*, 57 Mich. 525, 528; 2 *Sher. & Red., Neg.*, s. 479; *Renner v. Northern Pac. Ry. Co.*, 46 Fed. Rep. 344; *Chicago, etc., Rd. Co. v. Sykes*, 96 Ill. 162; *Nichols v. W. O. & W. Rd. Co.*, 83 Va. 99, 104; *Wilkins v. St. Louis, etc., Rd. Co.*, 101 Mo. 93; *Adams v. Iron Cliffs Co.*, 78 Mich. 271; *Greany v. Long Island Rd. Co.*, 101 N. Y. 419; *Meek v. Penn. Rd. Co.*, 38 Ohio St. 632.

The employes of the defendant ought to have observed the perilous position of the plaintiff while attempting to pass between the cars, and to have refrained from moving the cars while he was in that position. *Henderson v. St. Paul, etc., Rd. Co.*, 55 N. W. Rep. 53; *Andrews v. Central Rd. Co.*, 86 Ga. 192; *Lewis v. Balt. & Ohio Rd. Co.*, 38 Md. 588; *Balt. & Ohio Rd. Co. v. Trainer*, 33 Md. 542; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551.

A civil case has seldom, if ever, been reversed by reason of argument of counsel, unless counsel has stated as a fact, within his own knowledge, some matter which was not in evidence, and which was material to the consideration of the case. Plaintiff's counsel in the case at bar made no such statement. *Rea v. Harrington*, 58 Vt. 181; *Proctor*

v. DeCamp, 83 Ind. 559; *Shuler v. State*, 105 Ind. 289; *Battishill v. Humphreys*, 64 Mich. 514, 519.

TYLER, J. This suit was brought to recover damages for injuries sustained by the plaintiff by reason of the alleged negligence of the defendant.

The plaintiff's evidence tended to show that the defendant was guilty of negligence; that it might have pushed the cars further south so as to have cleared the crossing instead of leaving them upon it; that it thereby violated Act No. 39, Laws of 1882, and rendered itself liable to a fine of from five dollars to twenty dollars.

It further tended to show that this highway crossing had existed in substantially the same manner for twenty years or more, and that during a considerable part of that time, in going to and from his work, the plaintiff had passed it daily; that he knew that it was within the limits of the B. & M. freight car yard; that freight trains were made up on it; that in passing he frequently found cars upon the crossing and had to wait for their removal, the time varying from five to twenty-five minutes; that on this occasion eight or ten cars stood upon the crossing—three or four south and the others north of it when he reached it—and had stood there, he thought, after he came in sight of it, about fifteen minutes when he attempted to pass over the couplings; that as he stood beside these cars he could see quite a distance south, and that no other cars stood on that track; that the north end of the obstructing cars cut off his view of the track in that direction; that no engine was attached to these cars and none was in sight; that before attempting to pass he stepped back from the cars some fifteen or twenty feet to see if an engine was in sight and saw none; that an engine of the B. & M., with two cars attached in such a way that the cars were between the crossing and the engine, stood north of the crossing at or near the water tank; that he

then stepped forward to the cars, seized hold of the irons (ladders) on the ends of two cars and threw his feet upon the heads of the draw bars, but was unable to throw his body up; that he was engaged in a lively struggle for about half a minute, as he estimated the time, when the engine and two cars ran down from the north and coupled with the obstructing cars, and pushed them south off the crossing; that in his attempts to raise himself his left foot slipped onto the coupling links, so that when the cars came together his foot was crushed between the two draw bar heads; that two or three persons passed between the cars before he made the attempt; that no bell rang and no whistle sounded while he was waiting; that there was no necessity for his crossing before the cars should be removed other than that he expected his daughter was, as usual, waiting for him with a carriage on the east side of the tracks, though she was not in fact waiting. The plaintiff was sixty-five years old, and weighed from one hundred and eighty to one hundred and ninety pounds. It did not appear that any official or employe of the defendant knew that other persons had crossed or of the plaintiff's attempt.

Although upon the plaintiff's evidence no employes of the defendant were in charge of the cars and there were no indications that they were about to move, he must have known that they would soon be moved from the crossing; that if they stood there as long a time as he thought they had, they were liable to be moved at any moment. It is apparent that the people who had collected at the crossing on both sides of the tracks momentarily expected the cars to be moved, as was the custom. Though the plaintiff could see that no engine was attached, he could not assure himself that one was not in a position to run down and be attached in less time than he would require to mount and cross over the couplings. It does not appear that he inquired of any person whether or not the cars were about to

move, or that he used any diligence to ascertain, except to step back a few feet so that he could the better see the track, which he says he could see but a short distance. The engine was in fact close at hand, as the event proved.

It is a general rule that though the defendant may have been guilty of negligence and of a violation of law, the plaintiff cannot recover if his own negligence contributed to the happening of the accident. Beach on Contrib. Neg., s. 64, says :

“No failure on the part of the railroad company to do its duty will excuse anyone from using the senses of sight and hearing upon approaching a railway crossing; and whenever the due use of either sense would have enabled the injured person to escape the danger, the injury is conclusive evidence of negligence without any reference to the railroad company’s failure to perform its duty.”

This court has repeatedly held that where a party claims to have suffered damage by the carelessness or negligence of another, it is a rule nearly if not entirely universal that if the negligence or carelessness of the person injured contributed in any material degree to the production of the injury complained of, he cannot recover; that if the injury is in whole or in part owing to the plaintiff’s want of ordinary care or prudence, he cannot recover. Rob. Dig. 480, Pl. 14, 15.

The defendant claimed in the court below that the case made by the plaintiff showed him to have been guilty of contributory negligence, so that in law he was not entitled to a verdict. Ordinarily, under the long settled rule in this state, this is a question of fact for the jury, and in this case there was no error in the refusal of the court to direct a verdict for the defendant, unless the case fell under the exception to the rule. *Rogers v. Swanton*, 54 Vt. 585; *Fassett v. Roxbury*, 55 Vt. 552. The exception to the general rule is clearly stated by Ross, C. J., in *Latremouille v. B. & R. Co*, 63 Vt. 336, as follows :

"It only becomes a question of law purely, when conceding the facts to be undisputed, or to be such as the testimony most favorable to the plaintiff has any reasonable tendency to establish, they will not warrant a legal inference, nor if the inference be of a fact, have a reasonable tendency to support such inference of fact, necessary to give the plaintiff a verdict."

In that case the plaintiff's intestate was a car inspector and repairer of the defendant and went under a standing car to repair it, knowing that a train was liable at any moment to back down upon it. A train did back down and he received fatal injuries; *held*, that the danger was obvious, and that there could be no recovery.

In *Worthington v. Cen. Vt. R. Co.*, 64 Vt. 107, Rowell, J., stated the rule concisely as follows:

"When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it—no room for opposing inferences. This is clearly shown by the adjudged cases."

In that case the plaintiff, a passenger, was unnecessarily standing on the steps or platform of a rapidly moving train. See *Germond's Admr. v. Cen. Vt. R. Co.*, 65 Vt. 126.

It has often been held that it is gross negligence in a traveler to attempt to pass between the cars of a standing train to which an engine is attached, and which he knows, or reasonably ought to know, is ready to move. This is so laid down in the text books. In *Corcoran v. Cen., etc., R. Co.*, 105 Mo. 399, it was held that although the plaintiff did not know whether an engine was attached to the cars or not, yet as he did know that one ought to have been attached for the purpose of moving them off the crossing, and that engines were at work in the yard moving trains and switching cars, it was gross negligence in him to attempt to go upon them.

It was said by the court in *Chicago, etc., R. Co. v. Houston*, 95 U. S. 697, that it was the duty of the plaintiff when about to cross a railroad track to make use of his senses, as far as there was opportunity, in order to ascertain if there was danger in crossing; some cases say, "vigilant use."

In *Hudson v. R. Co.*, 101 Mo. 13, the court held that for a person to climb over stationary cars without looking to see whether or not they were attached to an engine was such gross negligence as precluded a recovery for injuries received in the attempt, and cited 1 Thomp. on Neg. 429; 2 Rorer s. 1055; Beach on Contrib. Neg. s. 72; *Gahagan v. R. Co.*, 1 Allen 187; *R. R. Co. v. Dewey*, 26 Ill. 255; *Lewis v. R. Co.*, 38 Md. 588; *R. R. Co. v. Pinchin*, 112 Ind. 592. In that case the plaintiff placed one foot on the draw bar of one car and the other on the draw bar of the other car, each foot being just behind each of the coupling pins of the two connecting cars, so that, as the court observed, the slightest oscillation of either car would in an instant convert the draw bars and coupling pins into an improvised trap, which would seize and did seize and crush his foot. The court said:

"If such conduct does not constitute contributory negligence, how shall it be christened? * * * It is no answer to this to say that the defendant was guilty of reprehensible conduct in obstructing the street with its cars beyond the time allowed by the city ordinance."

"A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary care to be in the right. * * * One person being in fault will not dispense with another's using ordinary care for himself." *Butterfield v. Forrester*, 11 East 60.

The facts in *R. R. Co. v. Pinchin*, *supra*, were different from those in the case at bar, but some rules are laid down by the court in that case that are applicable in this, viz. :

"A person who has knowledge that a train of cars is stopping temporarily at a way station on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it." * * * "It will not avail the plaintiff that he was not fully aware of his danger, for the plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man." * * * "One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence."

* * * "A man has no right to cast himself upon a known danger when the act subjects him to great peril. If there is a risk apparent or known that will probably result in injury, he must not encounter it."

Numerous cases of the same import are cited in the opinion. In that case the plaintiff attempted to pass between the coupled cars of a freight train that was standing temporarily across a street at a way station. He did not see, but might have seen, that an engine was attached.

In *O'Mara v. D. & H. Canal Co.*, 25 N. Y. 192, the train had stood upon a public crossing for some time. The plaintiff could not see whether an engine was attached or not, owing to a curve in the track. He attempted to climb over between the cars, and was injured by the train being suddenly moved; *held*, that he could not recover.

There are numerous reported cases, many of which are noted in the briefs, in which it is held that it is gross negligence in the traveler to attempt to pass between the cars of a moving train; also between the cars of a standing train with an engine attached and steam on ready to move; also where the traveler could not see whether an engine was attached or not. Counsel in their extended researches have found no case precisely like the one at bar in its facts. The one above referred to in 105 Mo. is like it in this respect—that the plaintiff in that case knew that an engine ought to be attached in order to move the cars off the crossing. Other

cases lay down the rule that when the traveler knew or reasonably ought to have known that the cars were liable to be moved at any moment, it is legal negligence in him to attempt to pass between them.

Cases cited by plaintiff's counsel seem to hold a somewhat different doctrine, as

"When a train stands across a public street, without right, a person has a right to walk along the street behind the rear car, and assume that the train will not back without giving notice." *Robinson v. R. Co.*, 48 Cal. 409.

In *Klanowski v. R. Co.*, 57 Mich. 525, it was held that when the defendant neglected certain statutory duties, made for the benefit of travelers and others, and a person was injured, the defendant would be liable, although the person was guilty of some fault which contributed to the injury complained of; that such fault ought not to be available to the defendant in making defence against its wrongful acts, unless it was wilful or gross so as to be inexcusable. Other cases cited seem to require less care and prudence from the party injured when cars obstruct a public street in violation of law than under other circumstances.

We think the better doctrine is that stated in *Andrews v. R. Co.*, 86 Ga. 192. In that case the court said:

* * * "The obstruction was open and visible, and no reason is shown why the plaintiff should not have anticipated that the train might not move at any moment. Yet, without waiting for it to move, applying to have it moved, or attempting to go round it, he voluntarily and without warning anyone of his intention, exposed himself between the cars by climbing upon their platforms adjacent to the bumpers, and was injured."

The court further said:

"Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train cannot recover unless the engineer, conductor,

or some other person having control of the train's movements knew of his attempt to cross, or had notice of his exposure to danger."

The plaintiff knew from experience that the cars had already stood on the crossing a longer time than usual. If the engine and two cars were within the range of his vision, he ought to have seen them. If, as he claimed, he could see but a little distance up the tracks, and the engine and two cars were at or near the water tank and beyond his vision, he had no right to attempt so hazardous an undertaking, for he had no assurance that the engine was not where it could be run down and attached in a moment's time, as was in fact done. As was said by the court in *Lewis v. R. Co.*, 38 Md. 588:

"His attempt to cross where he did was simply consulting his own convenience at the risk of his safety."

It was a voluntary contribution of his own negligence to the occurrence of the accident.

The reason for the holdings in the various cases cited by counsel does not rest in the mere fact that an engine is attached to the cars, even when it has steam on and is ready to move, but because the situation is one of danger, the imminency of which the plaintiff, in the exercise of his faculties, might have and should have understood.

If it would have been gross negligence in the plaintiff to have attempted to pass between the cars when an engine was attached with steam on ready to start, it is difficult to see why it was not equally negligent in him to attempt to pass when it was in fact in such a position that it could be attached in a moment.

When the plaintiff rested the defendant moved for a verdict; the motion was denied, and the defendant excepted. To have availed itself of its exception it should have then rested. By proceeding with the trial the motion and exception were waived.

The defendant's evidence tended to show "that all the men, being the engineer, fireman, conductor and two brakemen, in charge of the B. & M. engine and cars, were attending to their respective duties and were in their proper places; that the gateman was in his house attending to his duties, and that none of them saw the plaintiff before he was injured"; that the cars had not obstructed the crossing longer than was necessary, and that only one person crossed over before the plaintiff's attempt.

When the defendant rested and the plaintiff renewed its motion for a verdict, this was the case presented: The defendant's cars were obstructing a public crossing, one much used, especially at that hour of the day; people had congregated on both sides of the cars waiting for them to be moved; one, two, three or four persons had passed over the couplings; the conductor and trainmen were, at the time of the accident, attending to their respective duties, and none of them saw the plaintiff nor were aware of his attempt to cross.

The circumstances required, as has often been declared by other courts in respect to the running and operating of trains in towns and cities, especially on and over streets and other public places therein, that the greatest diligence, watchfulness and care should be observed by those operating them. *Burger v. R. Co.*, 112 Mo. 379, s. c. 34 Am. St. 379.

Although none of the defendant's employes saw the plaintiff, his counsel insists that it was a question of fact for the jury whether, in the exercise of that degree of care which, in the circumstances, the law required of them, they ought not to have seen him in his attempt to pass between the cars.

In *I. & S. C. Co. v. Tolson*, 139 U. S. 551, the rule of law was recognized that the contributory negligence of the plaintiff would not exonerate the defendant and disentitle

the plaintiff from recovering, "if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

In that case the court said that the jury might well be of opinion that while there was some negligence on the part of the plaintiff in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence; that if such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury.

In *Bemis v. R. Co.*, 42 Vt. 375, it was held that a railroad company was bound to exercise ordinary care to avoid injury to an animal that was upon the track by the wrongful act of its owner; but in that case it appeared that the engineer, from his position, had a full view of the track for a distance of seventy-five rods ahead of his engine.

In *Corcoran v. R. Co.*, *supra*, it is said:

"It is well settled that, notwithstanding the negligence of the defendant, if the plaintiff was also negligent, which the defendant did not know, or was not required to know, at the time, and the negligence of both concurred and co-operated in producing the damage, then the proximate cause of the injury will be attributed to the plaintiff, and there can be no recovery."

In that case the plaintiff, a police officer, was injured while attempting to climb over stationary cars without knowing whether an engine was attached or not, the cars obstructing a public street in violation of a city ordinance. It was not claimed that any employe of the defendant knew of the plaintiff's perilous situation.

In *Rine v. R. Co.*, 88 Mo. 392, it was said that if the employes of the company saw the plaintiff in an exposed and dangerous situation in time to have avoided the acci-

dent, then they were bound to use all reasonable diligence to have avoided it; "that the liability of the defendant should be limited to negligence and want of care after the exposed and dangerous position of the plaintiff came to the knowledge of the servants who are charged with the want of care."

In *Corcoran v. R. Co.*, *supra*, the court said that the defendant's employes "were not bound to look for the plaintiff where he had no right to be," by which remark was evidently meant that no inference of negligence could be drawn from the mere fact that they did not see him.

In *Andrews v. R. Co.*, *supra*, the defendant's liability was limited to the knowledge which the employe in charge of the train had of the plaintiff's attempt to cross and notice of his exposure to danger.

In *Lucas, Admr., v. R. Co.*, 6 Gray 64, the wife of the plaintiff went into a car to assist an aged and infirm relative to a seat, and then left the car after the train moved. In jumping to the platform she was thrown under the wheels and fatally injured. The plaintiff's evidence tended to show that the usual signals for starting the train were not given, and that it started with a sudden jerk. The court said:

* * * "Mrs. Lucas, when the train started and when the jerk occurred, was where she had no right to be. And conduct which the law requires of those who wrongfully bring themselves into an emergency, is not to be measured by that which the law excuses in those who are wrongfully brought into an emergency by others."

Shear. & Red. on Neg., 2d ed., ss. 25 and 36, carry the rule no further than this: That a plaintiff may recover notwithstanding his own negligence, if the defendant became aware of his danger and failed to use ordinary care to avoid injuring him.

In this case the defendant's evidence tended to show that all the defendant's employes who were near the place of the accident were attending to their respective duties. No evi-

dence in the case tended to show the contrary. None of the employes saw the plaintiff attempt to pass between the cars, and there was no evidence that tended to show that they had reason to anticipate that he would attempt so hazardous an enterprise. If those employes had seen or been apprised of the attempt, they would have been legally bound to have used all reasonable efforts to have avoided the accident; but the liability of their employer did not begin until they saw or had notice of the peril, or, in the exercise of the care of a prudent and careful man, they ought to have seen or known of it.

Then, considering the dangerous situation and the opportunity which the defendant's employes had to see the plaintiff and others attempting to cross over, as disclosed by the evidence, was there a question of fact fairly arising upon the evidence, whether the employes ought to have seen the plaintiff, or ought to have noticed that persons had passed over the couplings, or ought to have anticipated that they would attempt it?

The evidence as to the positions occupied by the employes at the time of the accident and what they were severally doing came almost wholly from the defendant's witnesses, and was not conflicting. The conductor stood on the north side of the crossing, east of the cars, attending to the work; a brakeman stood at the north end of the cars, on the east side ready to make the coupling, and did make it when the engine and two cars came down; the engineer and fireman were in their proper places, and a brakeman was on the top of the car next to the engine. No question arises but what each was attending to his duties in respect to backing the engine and two cars down to the crossing, making the coupling and removing the other cars.

Was there any inference to be drawn from the undisputed facts that the defendant's employes were negligent of any

duty they owed the plaintiff? Was there any room for a difference of opinion among reasonable men as to the inference which might be drawn from those facts? We think not. It should have been held as matter of law that no inference of negligence could be drawn from the fact that they did not see the plaintiff and others in their attempt to pass between the cars.

The evidence was conflicting upon the question whether the bell was rung and the whistle sounded as a warning that the cars were about to be moved. It has often been held that the mere omission of a railroad company to give such signals at crossings will not excuse the traveler from using ordinary care and prudence. In *R. R. Co. v. Houston*, *supra*, plaintiff's wife was fatally injured by a passing train while she was attempting to cross the track at a street crossing. The plaintiff's evidence tended to show that no signal was given as the train approached the crossing. The court said:

"Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

"When by law ringing the bell and sounding the whistle are required in approaching and passing over public crossings, the omission thereof amounts to actual negligence on the part of the company. But such omission and negligence does not render the company liable for injuries received at such crossings unless the omission be the cause thereof or

contribute thereto, without contributory negligence of the injured party. Negligence in the railroad company in giving the signals, or in omitting signals of any kind, will not excuse plaintiff's omission to be diligent in such use of his own means of avoiding danger; and where, by such use of his senses he might avoid danger, notwithstanding the neglect to give signals or warning, his omission is contributory negligence." *Rumpel v. R. Co.*, 35 Pac. R., 700, citing 2 Rorer, s. 1130; *R. R. Co. v. Copeland*, 61 Ala. 380; *R. R. Co. v. Houston*, *supra*.

Upon the whole case we think there was no other inference to be drawn from the evidence than that the plaintiff's negligence was the proximate cause of the injury, and therefore, as matter of law, he was not entitled to recover.

The plaintiff's counsel, in his closing argument to the jury, made certain statements which defendant's counsel objected to, and to which exceptions were allowed the defendant.

The exceptions state that "the plaintiff called one George Magoon and had him sworn with his other witnesses at the opening of his case, but did not improve him as a witness before he rested." After all its other testimony had been introduced, the defendant called said George Magoon to the witness stand and he testified, in answer to the questions of the defendant's counsel, that "he was at work on Lane's block with the plaintiff, and had gone down to the crossing just ahead of the plaintiff; that when he went down the west gate was lowered immediately after he passed, and before the plaintiff passed; that he stood a short time, perhaps a minute or more, beside the cars, and then hurriedly passed over the bunters and between the cars; that as he passed over the space between said gate and the cars he thought he saw two engines above there, but knew that he saw one; that when he stepped between the cars he thought he saw one or two cars standing on the main line next to the passenger depot with an engine above them, and knew he then saw an engine on the main line somewhere

near the water tank, and thought it was backing down towards the highway crossing; and that the bell of one of the engines was ringing, which had something to do with his hurrying through between the cars." The evidence of the plaintiff tended to show that in a previous conversation this witness had stated that the west gate was up; that he stood beside the train for ten minutes before passing between the cars; that he saw an engine, but could not tell whether it was backing down or not. The plaintiff claimed that the testimony of this witness was false in fact, and utterly at variance with the statements which he had made as above, and in consequence of which he had been subpœnaed by the plaintiff. The witness himself testified that he had been subpœnaed by the defendant the day before. In commenting upon this testimony and upon the credibility of the witness, counsel for the plaintiff said:

"He is here on the other side. Let the full panel ask how he got here. He says he was subpœnaed, and that until he took the stand they did not know what he would swear to; that he hadn't talked with Young or Dickerman, hadn't talked with Crane or Alfred, hadn't talked with Folsom."

Mr. Young: "We desire an exception to that statement. The witness said he talked with me at noon."

Mr. Prouty: "If I have misstated the testimony you will correct me; my recollection is that he did not talk with any of these gentlemen."

Here the reporter read from the witness' testimony as follows:

CROSS-EXAMINATION BY MR. PROUTY.

Q. Did you ever talk with anybody on the other side till to-day noon?

A. No, sir, not unless someone was talking it over at different times about the accident.

RE-DIRECT BY MR. YOUNG.

Q. Did you ever talk with Mr. Dickerman or myself or Crane or Alfred about this case until to-day noon?

A. No, sir.

Q. Or with Mr. Folsom?

A. No, sir.

Q. Or with Mr. Brady, the superintendent of the Canadian Pacific?

A. Yes, sir; I presume Mr. Brady said something.

Q. I mean Mr. Brady, the superintendent of the Canadian Pacific railroad.

A. Oh, no, sir; I don't know him.

Then Mr. Prouty went on to say:

"If that is true, gentlemen, it probably accounts for his testimony. I don't know how much they paid that fellow; but I tell you that when he gave his testimony on the stand he was in the employ of the Boston & Maine company."

Mr. Young: "We desire an exception to that."

The Court: "Take your exception."

Mr. Prouty: "That is, in my opinion. I presume it did not cost them much; that sort of a fellow don't come high; a viper of that sort don't value his services at an extraordinary price. They wanted to know why I did not put him on. I didn't put him onto the stand, because of all the witnesses I talked with about the case he was the only man that couldn't look me in the eye and tell me his story."

Mr. Young: "We desire an exception to that."

Mr. Prouty: "I didn't put him on, because I knew if I put him on he would knife me."

Mr. Young: "We desire an exception to that."

The Court: "Exception allowed."

Mr. Prouty, continuing, said in substance:

"Gentlemen, you have seen this fellow, and you have seen his manner of testifying. You have seen the other witnesses for the plaintiff and their manner of testifying. I appeal to you. He is the only witness of those originally called here by the plaintiff who has not been able to look you in the eye and tell his story in an honest, straightforward manner."

There was no evidence offered tending to show that said Magoon was paid, given or promised anything for testifying

on behalf of the defendant, or that he was ever in the employ of the defendants or either of them, or that he did not or could not look Mr. Prouty in the eye and tell him his story, any further than the appearance of the witness and his manner of testifying might indicate; nor did it appear that Mr. Prouty knew that the witness would knife him if he put him on. Mr. Prouty, in his argument, did not give the jury to understand that he had any personal knowledge of the fact that the witness had been paid for his testimony, unless they understood that from what he said as above stated.

The exceptions further show that "the employes of the defendant who were improved as witnesses nearly all testified that both engines were just north of the crossing at the time of the accident and moving towards the crossing, and that the bells upon one or both of the engines were ringing at that time." In commenting upon the idea that these witnesses should be able to remember whether or not the bell was in fact ringing upon that occasion, counsel for the plaintiff said:

"I don't know how many suits in which railroad companies were involved you may have heard tried, but it is a general rule that the bell always rings; there is no case on record in which the bell did not ring."

Mr. Young: "We desire an exception to that."

The Court: "Take your exception."

Mr. Prouty: "It is the universal rule that the bell always rings. One of the stock questions which a railroad manager asks an applicant for employment is, 'Does the bell ring?' No evidence was offered tending to show anything about bell ringing on any other occasion, or about any claim being made by this or any other railroad company that a bell was rung on any occasion, save the time of this accident."

The tendency of the remarks concerning the witness Magoon was to induce the belief in the minds of the jurors that he had been hired to falsify, either by the defendant or its counsel, and to prejudice the defendant and its case with-

out any warrant therefor so far as is disclosed by the evidence. It was competent for the plaintiff to show, if he could, that the witness had made statements out of court contradictory to his testimony, and thus impeach his credibility; and it was competent for counsel to comment upon the claimed impeachment, but the record shows no justification for a charge or an insinuation of bribery.

The other statement above quoted was unauthorized by any evidence that was, or by any known rule of evidence could have been, in the case; and yet the statement was made as a fact, was likely to have been received by jurors as such, and to have prejudiced the defendant's rights in their minds.

That these statements were valid ground of exception is well settled.

"Counsel in their arguments to the jury are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case; any violation of this rule entitles the adverse party to an exception, which is as potent to upset a verdict as any other error committed during the trial." *State v. Hannett*, 54 Vt. 83.

"Exception was taken by defendant to a remark of the counsel for the plaintiff in the closing argument to the jury. He made a statement of a fact to the jury which concededly was not in proof. The impropriety and wrong of counsel thus stating or assuming facts in argument which are outside of all evidence are perfectly manifest. If a deliberate act, its object can be only to have the jury consider a fact not in the case, and thus induce a verdict not warranted by the evidence. Legitimate argument elucidates the truth. Its power and usefulness in this behalf are very great. The largest latitude should therefore be allowed to counsel in argument fairly within the scope of the evidence. But it has been repeatedly held in other jurisdictions and recently in this, that when counsel persistently travel out of the record, basing argument on facts not appearing, and appealing to prejudice irrelevant to the case and outside of the proof,

it not only merits the severe censure of the court, but is valid ground for exception." *Rea v. Harrington*, 58 Vt. 181.

In *Bullard v. R. Co.*, 64 N. H. 27, it was held that a verdict would be set aside for unwarranted remarks of counsel to the jury in closing, unless the presiding judge found, as a matter of fact, that the jury were not influenced thereby, or that the effect upon their minds was wholly removed by a retraction of counsel, the charge of the court, or in some other way. In commenting on this subject Smith, J., said:

"In spite of the fullest and frankest retraction, and the most explicit and emphatic instructions to lay the remark entirely out of consideration, the trial may not be fair. It may not be in the power of the retracting counsel and the court to remove the prejudice. Their combined and vigorous exertions may not control the mental operations of the jury. The jury may not be able wholly to free their memory or their judgment from the unfair and illegal impression made by a plausible statement of fact, which may seem to them entitled to more respect than the rule of law that excludes it."

In *Perkins v. Burley*, 64 N. H. 524, counsel stated in argument to the jury, "that if they knew how the plaintiff and his father and brother were regarded in the vicinity in which they lived, he would be willing to submit the case without argument." Blodgett, J., said that this "was, in effect, a declaration that the reputation of the plaintiff and his witnesses was bad in the vicinity of their homes, and was known to be such by the counsel himself. This declaration, not being evidence, was plainly without the bounds of legitimate advocacy, and from its character inevitably tended to prejudice the plaintiff's case, and to deprive him of that fair and impartial trial to which all parties are entitled as of right." See also *Robertson v. Town of Madison*, 29 Atl. R. 777, (N. H.).

In *Brown v. Swineford*, 44 Wis. 282, the court reversed a judgment and ordered a new trial on an exception of this kind, and said:

"The learned counsel went beyond the legitimate scope of all argument by stating and commenting on facts not in evidence. * * * The appellant took his exception, and his counsel now supports it by numerous cases. * * * All of them support the rule now adopted by this court, that it is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume *arguendo* such facts to be in the case when they are not. Some of the cases go further, and reverse judgments for imputation of counsel of facts not pertinent to the issue, but calculated to prejudice the case. There are cases in conflict with those which support this rule. But in the judgment of this court, the rule is supported by the weight of authority and by principle."

In *Coble v. Coble*, 79 N. C. 589, it was held not to be within the privilege of counsel, in argument to the jury, to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and bystanders when he had not been impeached.

"If counsel go beyond the evidence and bring in foreign and unproved matters, courts should interfere, and if the trial court does not interfere, and the matter improperly brought before the jury is of a material character, the appellate court may reverse the judgment." * * * "If the statement is an unimportant one, or one not likely to wrongfully influence the jury, the verdict will be upheld." *Proctor v. DeCamp*, 83 Ind. 559; *Battishill v. Humphreys*, 64 Mich. 514.

That case and the others noted on the briefs are to the effect that, while a verdict will not be set aside for mere irrelevant remarks of counsel in argument, counsel must be confined within legitimate bounds in the discussion of facts before the jury. None of the cases to which we have been referred are at variance with the rule laid down by Veazy, J., in *Rea v. Harrington*. The statements of counsel in the present case clearly fall under that rule, and entitle the defendant to a reversal.

The omission of the trial court to stop the counsel in his argument, and require him to retract his unwarranted state-

ments when objection was made, was tantamount to a ruling that the statements were warranted by the evidence. In this there was error.

Judgment reversed, verdict set aside, and cause remanded.

TAFT, J. I doubt upon the first question discussed.

Upon the other question, if the omission to stop the counsel when misstating facts is regarded as a ruling, I concur; otherwise I dissent, as this court sits only in revision of errors made in the rulings, and the refusals to rule, made in the court below. I, for one, think the proper manner to deal with the misconduct of counsel in argument is for the trial court, in its discretion, to set aside the verdict if by such means one is obtained.

HIRAM NORTON'S ADMINISTRATOR

v.

JOHN PERKINS.

OCTOBER TERM, 1894.

When different instruments should be read together. Ejectment for failure to support. Evidence. Fraud in grantor no defence.

1. Where the grantee, upon receiving a deed of real estate, executes, to give effect to the contract in pursuance of which the deed was made, a written instrument specifying that the grant is upon condition that the grantee shall support the grantor for life, the two instruments should be read together, and the writing not under seal will have exactly the same effect upon the legal title conveyed by the deed as though it were written into that instrument.
2. In such case the grantor may maintain ejectment for a non-compliance with the conditions expressed in the writing not under seal.
3. In case of a conveyance of property conditioned for life support, the value of the property may be shown as bearing upon the character of the support to be furnished, where the conditions leave that indefinite.
4. Where it is understood that the support is to be furnished upon the premises, and the parties have entered upon the fulfilment of the contract, the fact that the grantor, after an absence of some time, returns and receives his support without complaint, is evidence tending to show a waiver of any previous breach of the conditions.

5. If the defendant was bound to furnish the support only on the premises, evidence that he did not support the intestate while absent is inadmissible.
6. Error in the admission of testimony is not cured by the fact that later in the trial the one introducing it claims no benefit from it.
7. What the intestate did and said while absent from the premises would have no tendency to show a breach of the conditions.
8. Neither did the fact that the plaintiff, who was a son of the intestate, refused to visit his father at the defendant's house because defendant was a man of bad disposition, have such tendency, and was not admissible.
9. That the intestate made this conveyance in fraud of his creditors, or fraudulently concealed from the defendant the fact that he was then owing debts, would be no defence in this action of ejectment for a breach of the conditions.
10. A record of a criminal proceeding which recites that complainant averred that six turkeys had been stolen from him and that the respondent had found the same, and that the respondent was arraigned upon this charge and convicted of the same, does not show that he was convicted of a crime, for it is not a crime to find stolen property.

Ejectment. Plea, the general issue. Trial by jury at the December term, 1893, Addison county, MUNSON, J., presiding. Verdict for the plaintiff to recover the possession of the premises and one cent damages. The defendant excepts.

September 4, 1889, the plaintiff's intestate conveyed to the defendant the premises in question, and upon the same day gave him a bill of sale of certain personal property which was on the premises. The deed contained the usual covenants of warranty "subject to certain mortgages which the said Perkins is to assume." Upon the same day, and in pursuance of the contract in virtue of which the deed and bill of sale were executed, the parties signed the following agreement:

"Whereas, I, Hiram Norton, of Addison, in the county of Addison, and state of Vermont, have this day given a

warranty deed of my home farm in said Addison, together with a bill of sale of certain articles of personal property to John Perkins, of Crown Point, N. Y., upon the condition that the said John Perkins, his heirs, executors or administrators shall furnish me a good support in sickness and health during my natural life, meat, drink, clothing, lodging, spending money, doctors' bills paid, suitable horse, harness and buggy or cutter, for me at all times seasonable to drive and use, all of which if well and faithfully done, the said property to vest in and belong to the said John Perkins or his heirs, executors or administrators.

"Witness our hands, this September 4th, 1889.

HIRAM NORTON.
JOHN PERKINS."

This agreement was made as one of the instruments necessary to carry out the contract which the parties had entered into, and was executed at the same time with the other two instruments. The three were recorded in the land records of the town of Addison.

The plaintiff claimed that the last writing was to be read in connection with the deed, and as a part of it, and that inasmuch as the defendant had not complied with the conditions therein expressed, he, as the representative of the intestate, was entitled to recover the possession of the premises. The defendant insisted that the third writing was to be read by itself, and that inasmuch as there had been before the beginning of the suit no re-entry or demand for possession, the plaintiff was not entitled to recover, even though there had been a breach of the conditions of that instrument. The court held that the deed and writing should be construed as one instrument, and that the plaintiff was entitled to recover if there had been a breach of the conditions. To this ruling of the court the defendant excepted.

As bearing upon the character of the support to be furnished the intestate, the plaintiff was allowed to show, sub-

ject to the exception of the defendant, the value of the real and personal property so conveyed.

It appeared from the testimony of the plaintiff that it was the understanding of the defendant and the intestate that the intestate should be supported upon the premises; that in pursuance of this agreement the defendant and his family moved onto the premises soon after the execution of the deed, and the intestate took up his home with them, and continued to reside there until sometime in the month of June, 1890, when he left, taking with him his horse and carriage; that the intestate remained away, stopping at various places until April, 1891, when he returned to the defendant's; that he then remained with the defendant until the last of August, 1891, when he again left, not returning until November 4, 1891; that he then remained upon the premises until April 12, 1892, when he once more left, and never returned. The intestate deceased in April, 1893. When not residing with the defendant upon the premises he lived with his relatives for the most part in the near vicinity.

Against the exception of the defendant, the plaintiff was allowed to show that while so absent from the premises the defendant did not contribute to the support of the intestate.

The plaintiff was the son of the intestate, and the intestate resided at his house a considerable portion of the time after the conveyance of the property when not residing with the defendant. The plaintiff testified that he did not visit the intestate at the house of the defendant, and was further allowed to state against the exception of the defendant as follows:

"Q. Why didn't you visit your father while he was at Mr. Perkins'?

"A. Well, for several reasons; the greatest reason why I didn't is because I don't think he is a man of very good disposition, and he isn't a man that I wish to associate with anyway."

The Mr. Perkins referred to was the defendant.

It appeared that the plaintiff at the time of the conveyance was indebted to various parties in considerable sums, and the evidence of the defendant tended to show that he, defendant, had no knowledge of this fact, and that the intestate represented to him that he had no debts of any amount, except the mortgage resting upon the real estate.

The defendant requested the court to instruct the jury that they were at liberty to infer from the fact that the intestate returned to the home of the defendant November 4, 1891, that being the last time he returned to the defendant's house, and accepted his support for a considerable period thereafter, that he had waived any breach of the condition which might have occurred previous to that time, and that if so waived it could not afterwards be set up as a forfeiture.

The defendant also requested the court to instruct the jury that if the intestate was indebted September 4, 1889, to various persons, as the testimony tended to show, and if he concealed the fact of such indebtedness from the defendant, and fraudulently represented to him that no such indebtedness existed, that would be a defence to this action, and the plaintiff could not recover. These instructions the court declined to give, and the defendant excepted.

With reference to what use the jury were entitled to make of the testimony in reference to the absence of the intestate from the home of the defendant, the court gave the following instruction :

"You are not at liberty to infer from the mere fact that Hiram Norton went away that there was a breach of the contract on the part of the defendant. But you are entitled to consider, in connection with the direct evidence as to the support and treatment he received at the defendant's, the circumstances under which he was living there, the circumstances under which he left there, the circumstances under which he remained away, and the circumstances under which he returned from time to time, as bearing upon the question of breach. You may draw from the facts which you find to be proven such inferences as are

justified by the common experiences of men; but you are not at liberty to indulge in surmises not founded upon the evidence."

The defendant excepted to so much of this portion of the charge as related to the circumstances under which he remained away, and the circumstances under which he returned from time to time, as bearing upon the question of the breach.

Stewart & Wilds for the defendant.

The written conditions did not so form a part of the deed that the plaintiff can treat a failure to comply with them as a forfeiture of the defendant's right under the deed. His remedy is not at law, but in equity. No case can be found in which it has been held that a defeasance executed upon a separate paper, although at the same time, was available in an action at law. 4 Kent, Com., 129; Hob., 125; 2 Comyn's Digest, 629; 2 Bl., Com., 327; *Fowell v. Forrest*, 2 Saund. 48; 1 Devlin, Deeds, s. 21; Tiedman, R. P., s. 303; 2 Wash., R. P., 445; *Kelleran v. Brown*, 4 Mass. 443; *Flint v. Sheldon*, 13 Mass. 447; *Cutler v. Dickinson*, 8 Pick. 388; *Bodwell v. Webster*, 13 Pick. 413; *Flagg v. Mann*, 14 Pick. 479; *Eaton v. Green*, 22 Pick. 530; *Murfey v. Calley*, 1 Allen 108; *Bean v. Mayo*, 5 Greenl. 87; *Jewett v. Bailey*, 8 Greenl. 246; *Warren v. Lovis*, 53 Me. 463; *Lund v. Lund*, 1 N. H. 89; *Runlett v. Otis*, 2 N. H. 167.

Ejectment will not lie upon a mere equitable title. *Dewey v. Long*, 25 Vt. 564; *Buck v. Gilson*, 37 Vt. 653; *Cady v. Sanford*, 53 Vt. 636; *Hammond v. Alexander*, 1 Bibb. (Ky.) 333; *Davis v. Hulett*, 58 Vt. 90.

No forfeiture can be had for a breach once waived. *Brewin v. Farrell*, 39 Vt. 206; *Hubbard v. Hubbard*, 97 Mass. 188.

Hard & Bliss for the plaintiff.

The three written instruments having been executed at the same time and for the purpose of effectuating the same contract, should be read together as though one. *Bish., Cont.*, s. 852; *Gibson v. Seymour*, 3 Vt. 565; *Whitney v. French*, 25 Vt. 663; *Graham v. Stevens*, 34 Vt. 166; *Olcott v. Dunklee*, 16 Vt. 478; *Raymond v. Roberts*, 2 Aik. 204; *Strong v. Barnes*, 11 Vt. 221; *Reed v. Field*, 15 Vt. 672; *Rogers v. Bancroft*, 20 Vt. 250; *Tillemore v. Ins. Co.*, 20 Vt. 546; *Wing v. Cooper*, 37 Vt. 178.

So read, the papers constitute a grant upon a condition precedent, and the grantee acquired no title except upon a performance of that condition. *Lamb v. Clark*, 29 Vt. 273; *Olcott v. Dunklee*, 16 Vt. 478; *Dunklee v. Adams*, 20 Vt. 415, 422; *Tracy v. Hutchins*, 36 Vt. 225.

The value of the property conveyed was properly shown as bearing upon the consideration of the contract. 2 Phil., Ev., 353, (Ed. 1849); *Pierce v. Brew*, 43 Vt. 292.

ROSS, C. J. The intestate and defendant, September 4, 1889, to effectuate a contract then entered into, executed and delivered three written instruments. Over the intestate's signature, under seal, he executed a warranty deed to the defendant containing the usual covenants, except against a mortgage resting on the premises, and, over his signature, without seal, he executed a bill of sale of certain personal property to the defendant. Then signed by both was an instrument which reads :

"Whereas, I, Hiram Norton, of Addison, in the county of Addison, and state of Vermont, have this day given a warranty deed of my home farm, in said Addison, together with a bill of sale of certain articles of personal property to John Perkins, of Crown Point, N. Y., upon the condition that the said John Perkins, his heirs, executors or adminis-

trators shall furnish me a good support in sickness and health during my natural life, meat, drink, clothing, lodging, spending money, doctors' bills paid, suitable horse, harness, and buggy or cutter, for me at all times seasonable to drive and use, all of which if well and faithfully done, the said property to vest in and belong to the said John Perkins or his heirs, executors or administrators."

The writings were on separate papers, but all placed on record in the town clerk's office. The defendant does not contend that if the writing, expressing the condition, can be read as a part of the deed and contract, the title to the farm ever passed to him, except conditionally, and he admits that the plaintiff can recover in ejectment if he shows that he has failed to perform the conditions; nor does the plaintiff contend that he can recover unless it can be read as a part of the deed and contract.

I. Hence the first contention is, whether the writing expressing the condition can be read as a part of the deed and contract. The three written instruments were made to effectuate one contract and should be read together, unless there is some well established legal principle which forbids it. Only by so reading them can the contract be ascertained. If the condition had been written into the deed, it was the deed of the intestate, or a deed poll. By accepting it, the implied and expressed agreements to be performed by the defendant would not be under seal. Covenant could not be maintained on them. *Johnson v. Muzzey*, 45 Vt. 419. In *Whitney v. French*, 25 Vt. 663, and *Graham v. Stevens*, 34 Vt. 166, it is held, where the condition to a deed poll is written on its back—in the one unsigned, and in the other signed by the person accepting the deed—that the title passed only conditionally. This was so, not because of any covenant to that effect by the grantee. It was so, because by accepting it he obtained no greater rights than was evidenced by the entire contract. The question is not whether, if, by the deed, the title passed unconditionally to the defendant; a conditional

reconveyance from him must be under seal. Without doubt if that were the question, the instrument required to effect a reconveyance, at law, from him, must be under seal, in compliance with the statute for the conveyance of real estate. Here the question is, what kind of a title did the defendant take? This must be determined from the written instruments evidencing the contract between the parties. To determine what the contract was, and what the parties intended to effectuate by the three written instruments, all may and must be read together. When read together, the defendant would take fee in the premises declared for only on performance of the condition. In legal principle there is no more objection to reading the condition as a part of the contract, and of the deed when written on a separate paper, than when written on the back of the deed. When written on the back of the deed, it need not be signed nor sealed by the party accepting the deed, and to be bound by it. It simply shows that he accepted the deed on the condition named in what is written on the back of the deed. When written on a separate paper, signed by the grantee in the deed, the instrument shows equally as well, and is as effective legally, and as much a part of the whole contract, as when written into or on the back of the deed. There was no error in the rulings of the court on this point. When the defendant, contemporaneously with receiving from the intestate the deed conveying the fee, executed and delivered the condition, he thereby said to, and agreed with, the intestate, that he accepted the deed upon the condition written, and that the title to the property, described in the deed and bill of sale, should not become vested in him until he had furnished the intestate the support specified in the condition. Such, we think, is the legal effect of the execution and delivery of the three writings of September 4, 1889. They were all properly received in evidence, and so was the value

of the property conveyed, as bearing upon the kind and quality of the support contemplated by the parties.

II. Subsequently, on the trial, the plaintiff conceded that the parties understood that the defendant was to furnish the support upon the premises in contention. The defendant immediately entered upon the execution of the contract. The intestate remained with him, and received the support given until April 12, 1892, with the exception of absences from sometime in June, 1890, to July 4, 1890; from sometime in February, 1891, to sometime in April, 1891; and from the last of August, 1891, to November 4, 1891. The intestate spent these absences with his children and friends in the immediate neighborhood. The plaintiff claimed, and gave some evidence which will be considered later, that the absences were occasioned by the failure of the defendant to perform the condition of the contract in regard to support. The returns of the intestate were voluntary and uninfluenced, so far as is shown, by the defendant. Immediately on each return the defendant entered upon furnishing the required support, and the intestate received it without protest or reservation. Under these circumstances the defendant requested the court to charge:

"The jury are at liberty to infer from the circumstances developed in the evidence, that any breach of the condition, occurring before November 4, 1891, the last time he returned to the defendant's house, was waived by the intestate. If so waived, it could not be afterwards set up as a forfeiture."

The court did not comply with this request in terms, nor in substance. In this we think there was error. By the contract the intestate had no right to call upon the defendant for support, and at the same time claim that no contract requiring him to furnish such support existed between them. The two positions were inconsistent and could not be held by the intestate at the same time, certainly not without protest and notice. He could not, under the contract, call

upon, and receive from, the defendant his support, and at the same time, by mental reservation or otherwise, claim that the contract for such support theretofore existing between them was at an end. Whether the condition to the deed requires an act to be done in order to the vesting of the fee, or to prevent a defeasance of the fee already vested, the grantor, or party for whom the act is to be performed, may waive its performance. This is especially true where the condition is for the support, as in this case, of the grantor, upon the premises. What is proper support and care, and what such a lack of it as will put an end to the contract, and prevent the fee of the estate from vesting, often depends upon a great variety of circumstances and considerations. The kind of support and of treatment which would be wholly inadequate and inappropriate for one person, might be fully adequate and appropriate for another. It might depend upon the amount of property conveyed, upon the manner in which the person had been accustomed to live, the courtesy and forbearance with which he had been accustomed to be treated and to treat others. Vulgarity or profanity which would shock one and render his life miserable, might be inoffensive to another of a different character and habits of life. In every walk of life, many things are to be forborne rather than insisted upon. The person to whom such support is due always has the right to elect whether he will waive, or insist upon, a partial or full failure for a brief time to perform such a condition as putting an end to the contract, and his right to support. The failure to perform, which will defeat the vesting of the title, should be a failure in substance rather than of the letter of the contract. Otherwise, after years of faithful performance, one might lose, or be divested of his estate by a technical or partial failure. Where both parties are living on the estate, and in some sense in possession, so that a re-entry is not required to terminate the conditional estate, it is

more imperative that the grantor should, by some unmistakable act, indicate his intention to put an end to the contract for the vesting of the estate upon a failure to perform the condition. Exacting or acquiescing thereafter in the performance of the condition is evidence for the jury, from which they would be warranted in inferring and finding that he did not insist upon ending of the contract for such non-performance, but that he still treated it as subsisting. Some of the cases seem to treat such exacting, or acquiescing in, the further performance of the contract, as a legal waiver of any acts then known to him, which otherwise might work a forfeiture of the contract. *Hubbard v. Hubbard*, 97 Mass. 188 (93 Am. D. 75 and note). In which case the court say in substance, not only that receiving subsequently performance of the condition is evidence of a waiver, but:

“If he treated the condition as still subsisting and obligatory upon the tenant, after the alleged breach of it, it would be a sufficient waiver.”

See, also, *Crops v. Carson*, 8 Black. 138, (44 Am. D. 742, and an extended note collecting and reviewing the authorities). What is held and said in *Dunklee v. Adams, Admr.*, 20 Vt. 424, on the subject of waiver of a forfeiture is not inconsistent with the present holding. The question under consideration in that case was, whether equity would relieve against a forfeiture. There had been a judgment of forfeiture at law. The court, in reply to the contention that acceptance of certain things of minor importance under the contract was a waiver of the forfeiture, said:

“Waiver of the forfeiture would have been a good defence at law, and the judgment is to be taken as conclusive evidence that there had been none at the time it was rendered.”

III. In the earlier part of the trial, against the defendant's exception, the plaintiff was allowed to put in evidence to show that the defendant did nothing towards the intestate's support when he was absent from the premises in contro-

versy. If the defendant was under the duty of supporting the intestate when he was absent, this testimony would have been admissible as tending to show that he had failed to furnish the support required by the contract. Later in the trial, on the plaintiff's showing, the defendant was to furnish the support on the premises. His failure to furnish it elsewhere was not evidence tending to show that the defendant had failed to perform his contract. It was of a character which would be likely to prejudice the defendant in the minds of the jury. Under our practice a party cannot, against exception, introduce prejudicial testimony and cure its injurious effect by having the court charge the jury to disregard it, nor by changing the ground upon which he claims to recover. The admission of this testimony was error, not so much of the court as of the plaintiff. The case in regard to the admissibility and materiality of testimony stood as it would if the intestate had been living. If the intestate had been living he could not have been allowed to show his acts and declarations, done and made in the absence of the defendant, to establish a failure of the defendant to perform his part of the contract, unless the defendant had first introduced such acts and declarations, on the ground they were inconsistent with the intestate's claims on the trial, and then the intestate could introduce them only in explanation of the acts and declarations introduced by the defendant. One cannot make evidence in his own favor. This is so whether he is the party to the action or his administrator. *Godding, Admr., v. Orcutt*, 44 Vt. 54. It was error to receive in evidence, as tending to establish a failure by the defendant to perform the contract, against exception, the acts and declarations of the intestate when he was absent from the defendant. The charge on this subject, excepted to, is objectionable. It allowed the jury to consider as evidence tending to show a breach of the contract on the part of the defendant, "the circumstances under which he remained

away, and the circumstances under which he returned." The most such circumstances could legitimately be used for would be to show that the intestate by his acts and declarations when absent from the defendant was claiming there had been a breach of the contract for his support by the defendant. Such claims could be only used for the purpose already indicated. They could not be used to establish there had been such a breach. So far as the charge allowed the jury to use them to establish a breach of the contract by the defendant, it was erroneous. We also think the court erroneously allowed the plaintiff to give his reasons for not visiting his father at the defendant's, and to state that he acted in good faith, and on what he considered sufficient grounds, in bringing the petition to have the intestate adjudged an insolvent. These matters did not tend to show that the defendant had failed to perform his contract to support the intestate, and would naturally prejudice the jury against the defendant. Doubtless, as now claimed, the defendant did not except to the admission of some testimony, which he would have excepted to, if he had known that the plaintiff would claim that the defendant was bound to support the intestate only upon the premises conditionally conveyed. But this court cannot aid him in this respect. Neither was the county court in error in its action because he was misled on this point.

IV. The defendant also excepted to the refusal of the court to receive in evidence the certified copy of record made by two justices of the peace for the purpose of impeaching Hiram Winch, a witness produced by the plaintiff. Whether two justices of the peace who, on proper complaint, charging the person in whose possession the property was claimed to be with having stolen it, had issued a warrant to search for the property in the night time, and if the property was found to arrest and bring before them the person charged, have authority under the law, upon trial, to

render a valid judgment against such person for petit larceny, we have not considered nor determined. The alleged record does not raise that question. It does not show that Hiram Winch, in and by the complaint, was charged with any offence known to the law. The complaint, under oath, avers that he has had stolen from him six turkeys of the value of six dollars, which had been found by Hiram Winch, and which he suspected and believed were then concealed in the hog pen or barn of Hiram Winch. He prays for a warrant to search the premises, and if the property is found to bring the property and Hiram Winch before the justices, to be dealt with as the law directs. The record does not disclose whether the warrant prayed for was issued, but proceeds to aver that Hiram Winch was put to answer the complaint, pleaded not guilty, and put himself on the court for trial; and on hearing the evidence, the justices adjudged him guilty of the crime charged in the complaint. This is the substance of what the record discloses. The only thing therein charged against Hiram Winch is that he found some stolen property, and of this he is found and adjudged guilty and fined. But finding stolen property is no crime known to the law. If the complaint had charged Hiram Winch with having stolen the property, or with having concealed it, knowing it to have been stolen, the question argued whether two justices of the peace could therein convict the person charged of petit larceny would have been raised. As it is, the record does not show that Hiram Winch was charged with, nor convicted of, any crime. It was properly rejected.

V. By his sixth request the defendant asked the court to charge that if the intestate conveyed to the defendant the property in contention, with the fraudulent and deceitful purpose of avoiding his debts, enumerated, the plaintiff could not recover. By the seventh request he asked the court to charge that if the intestate fraudulently concealed

that he owed these debts, at the time of the contract, from the knowledge of the defendant, the plaintiff cannot recover. A fraud committed by the intestate upon his creditors, or by concealment of his debts upon the defendant, might furnish the defendant a cause of action, so far as he was injured thereby. It might give the defendant the right to rescind his contract with the intestate if seasonably acted upon. In defending this action the defendant is insisting upon the contract, and claiming that the property has become vested in him. As it vested only upon performance of the condition, he must show performance. That he was defrauded into making the contract may entitle him to recover damages, but when he is insisting that the title to the property has vested in him, it does not excuse him from performing the condition on which alone the title could vest in him. These requests were properly refused.

Judgment reversed and cause remanded.

Taft, J., being sick, did not sit.

ROBERT BENEDICT v. FRANK E. LAWRENCE.

JANUARY TERM, 1895.

Trial. Evidence in rebuttal.

The defendant having introduced evidence of an agreement between the plaintiff and his sister upon the one part, and the plaintiff's father upon the other, to pay the note of the father to the defendant, the testimony of the sister that no such agreement was made is strictly in rebuttal.

Assumpsit. Plea, the general issue. Trial by jury at the June term, 1894, Bennington county, TAFT, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

Batchelder & Bates for the defendant.

The testimony was too remote. *Aiken v. Kennison*, 58 Vt. 665; *Walworth v. Barron*, 54 Vt. 677; *Camp v. Averill*, 54 Vt. 320; *Moore v. Harvey*, 50 Vt. 297; *Keith v. Taylor*, 3 Vt. 153; *Rowe v. Bird*, 48 Vt. 578; *Hine v. Pomeroy*, 39 Vt. 211; *Phelps v. Conant*, 30 Vt. 277; *Bishop v. Wheeler*, 46 Vt. 409; *None v. Northouse*, 46 Vt. 587; *Lincoln v. Manufacturing Co.*, 91 Mass. 181.

O. M. Barber for the plaintiff.

The testimony tended to meet an issue first raised by the defendant. *Stevens v. Dudley*, 56 Vt. 164; *Greenl., Ev.*, s. 517a.

ROWELL, J. Plaintiff's father conveyed his farm and the personal property thereon to the plaintiff and his sister. The question was, whether the plaintiff agreed with the defendant that the price of all the property that the defendant bid off at plaintiff's auction should be applied on a note that defendant held against plaintiff's father, as the defendant claimed, or whether the agreement was that the price of only the property bid off that was covered by the chattel mortgage that secured the note should be thus applied, as plaintiff claimed. To support his claim the defendant introduced evidence tending to show that the plaintiff, either alone or jointly with his sister, agreed to pay the note; and the defendant testified that at about the time of said conveyance the plaintiff and his father came to see him, and that his father said in plaintiff's presence that he had deeded his farm to the plaintiff and his sister, and that they had agreed to pay the note. On rebuttal the plaintiff called his sister, who testified that there was no agreement between her and her brother on the one part and her father on the other that her brother should pay the note. We construe the exceptions to mean that the defendant claimed that the plaintiff, alone or with his sister, had agreed with his father, not with the defendant, to pay the note. That being so, it was clearly competent for the plaintiff in rebuttal to show that no such agreement was made as far as he was concerned, for that exactly met the defendant's claim in regard to the matter.

Judgment affirmed.

ALFRED NEAL, BY HIS FATHER AND NEXT
FRIEND, DAN. B. NEAL,

v.

BENJAMIN THORNTON.

OCTOBER TERM, 1894.

Cross-examination. Offer of settlement.

In an action for trespass to the person the plaintiff introduced his father as a witness, who testified that the defendant assaulted the plaintiff, his minor son, and broke his arm. *Held*, that the defendant could not show upon the cross-examination of this witness, as affecting his credibility, that witness, who had employed the doctor, offered to settle the case for the doctor's bill if the defendant would settle then without farther ceremony.

Trespass for assault and battery. Plea, not guilty. Trial by jury at the May term, 1894, Windsor county, THOMPSON, J., presiding. Verdict and judgment for the defendant. The plaintiff excepts.

French & Southgate for the plaintiff.

The offer of compromise could not be shown. 1 Greenl., Ev., s. 192; 2 Starkie, Ev., 38; *Gerrish v. Sweetzer*, 4 Pick. 374-377.

William Batchelder for the defendant.

START, J. The plaintiff in opening his case improved his father as a witness, and his testimony tended to show that the defendant assaulted the plaintiff and broke his arm. On cross-examination, as bearing upon the credibility of the witness, the defendant was allowed to show, subject to the plaintiff's exception, that the witness offered to settle for the doctor's bill for setting and caring for the plaintiff's arm if the defendant would settle then without any further ceremony. It appeared that the father employed the doctor and paid him.

This offer was not an admission of any fact relating to the extent of the plaintiff's injuries, about which the witness had testified differently, but an offer to compromise a claimed cause of action, provided the defendant would then pay the sum named without further ceremony. The offer being thus conditioned, it was error to allow the jury to consider it for the purpose of impeaching and discrediting the witness. Such offers are usually made with a view of obtaining friendly and amicable adjustment of differences, and for the purpose of avoiding prolonged and expensive litigation. Peace and friendship are of such worth that a man, for the sake of preserving such relations, will forego his strict legal right and submit to an abatement from his just claim. The offer which a man makes under such circumstances does not represent his judgment of what he ought to receive at the end of litigation, but what he is willing to take and avoid it. The fact that a man has offered to compromise and settle a just claim for a sum less than that to which he is legally entitled, for the purpose of preserving friendly relations and avoiding litigation distasteful to him, does not tend to impeach him when he is called to testify respecting the same subject matter while asserting his claim according to his strict legal right, and is not admissible for that purpose. *Harrington v. Lincoln*, 4 Gray 563; *People v. Genung*, 11 Wend. 20. The fact that the witness had offered to com-

promise his claimed cause of action for what he had paid out for doctor's bills could not be legitimately considered for the purpose of impeaching him.

Judgment reversed and cause remanded.

SIMEON HUSE v. FRED ESTABROOKS.

OCTOBER TERM, 1894.

Chattel mortgage. Indefiniteness of description.

A chattel mortgage of "two two-year-old heifers and three one-year-old heifers" with nothing more, is void for indefiniteness as against the vendee of the mortgagor, although it appear on trial that, at the date of the mortgage, the mortgagor owned the property described, and does not appear that he owned any other of the same kind.

Trover for two three-years-old and three two-years-old heifers. Heard on the report of a referee at the June term, 1894, Caledonia county, TYLER, J., presiding. Judgment for the plaintiff. The defendant excepts.

M. Montgomery for the defendant.

The mortgage was invalid for uncertainty in the description. Pingry, Chat. Mort., ss. 142, 143; *Bowers v. Andrews*, 52 Miss. 596; *Nicholson v. Carpe*, 58 Miss. 34; *Barrett v. Fisch*, 76 Iowa 553; *Parker v. Chase & Buck*, 62 Vt. 206.

Bates & May for the plaintiff.

The description was sufficient. *Parker v. Cheney*, 62 Vt. 206; *Jones, Chat. Mort.*, ss. 53, 54; 1 *Cobby, Chat. Mort.*, ss. 155 *et seq.*

ROWELL, J. The plaintiff relies for recovery on a chattel mortgage of which he is assignee, wherein cattle of the kind in question are described as "two two-year-old heifers and three one-year-old heifers," without more. The defendant was never a party to the mortgage, but purchased of the mortgagor after the mortgage was given.

There was no evidence before the referee tending to show that at the time the mortgage was executed the mortgagor "owned or was possessed of any stock of the kind described in the mortgage except what is therein described, and no claim was made that he did not then own and have in his possession all the stock which is described in the mortgage." It is found that the cattle in question were owned and possessed by the mortgagor at the time he gave the mortgage, and are the heifers that he attempted and intended to mortgage.

While it may often be difficult and sometimes impossible to describe property of this kind with such certainty that it can be identified without the aid of extrinsic evidence, yet the mortgage must contain some statement concerning the property that will serve to distinguish it from other property of the same kind when the existence of the thing stated is made to appear, which may be done by evidence *aliunde*. The object of the mortgage is to convey specific property, not to give a right to any property of the kind mentioned. The extent of the mortgagee's right is, to have claim on the identical property mortgaged, and if the description is so uncertain as to apply equally to any property of the kind described, there can be no identification without proving

something not referred to in the mortgage, which is not allowable. The description need not, as this court has said, be such as to enable one to find the property without inquiry ; but it must be such as to suggest the inquiry and afford a basis of identification. The statement of number and ownership has been held to be sufficient in certain circumstances, when it appeared that the mortgagor owned no more at the time than the number stated, and especially has such a statement, when coupled with a statement of location, been held sufficient if it appeared that the mortgagor had no more at the place named than the number stated. But in this case it is not found that the mortgagor owned no more heifers of the ages mentioned than the number stated. What is reported on this subject amounts to no more than saying that it did not appear whether he did or not. Neither ownership, possession, nor location is stated in the mortgage, nor is it stated that the heifers mentioned were all the heifers of those ages that the mortgagor owned ; so the description applies equally to any heifers of the ages stated, and you cannot apply it to the heifers in question without pursuing a line of inquiry not suggested by the mortgage and proving something not referred to in it. The description is, therefore, too indefinite to make the mortgage good against third persons.

As this view is decisive against the plaintiff's right, it is unnecessary to consider any other question.

Judgment reversed, and judgment for the defendant to recover his costs.

DANIEL COFFRIN v. MELISSA COLE.

OCTOBER TERM, 1894.

Equity. Injunction as to use of spring. Evidence. Decree supported by pleadings.

1. The defendant claimed title to the spring in dispute by adverse user by herself and grantor. Her deed conveyed "all the right" of the grantors "to take water from the spring on the granted premises." *Held*, that it might be shown by parol that the grantor of the defendant told her at the time the deed was made that she had no interest in the spring, but only a verbal license to pump water from it.
2. Where the bill alleges that the orator was the owner of the spring, and the answer denies this and sets up ownership in the defendant, the question of title is in issue, although the purpose of the bill is to enjoin the defendant from befouling the water.
3. A decree, confirming the title of the orator and enjoining the defendant from interfering with the orator's use of the spring, was proper upon the case thus made.

Bill in equity for restraining the defendant from interfering with a certain spring. Heard at the June term, 1894, Caledonia county, upon the report of a master and exceptions thereto. TYLER, Chancellor, decreed *pro forma* that the orator's title to the spring of water described in the bill be confirmed, and that the defendant be perpetually enjoined from interfering with the orator's use thereof. The defendant appeals.

The controversy was in respect to a certain spring from which both the orator and defendant took their water for domestic purposes. Both parties claimed title to their respective premises through one Hosea Welch, 2d, who obtained title to the same in 1854, and continued in possession until September, 1878. At the time Hosea Welch, 2d, went into possession the only buildings upon the premises were those now occupied by the orator; and these buildings were supplied with water from the spring in dispute, which was situated some ten rods from the buildings upon an elevation, and from which the water was conducted to the buildings through a half inch lead pipe. The master found that the buildings continued to be supplied with water from this spring in this manner from the time said Hosea Welch went into possession in 1854 down to the commencement of this suit.

The premises of the orator and defendant were originally embraced in the same parcel, and continued to be until 1878 or thereabouts. The buildings of the defendant were erected in 1872, under an arrangement between Hosea Welch, 2d, and one Holmes, by which Holmes was to construct the building, and was to have the right to purchase the same upon certain terms and conditions which were never complied with. While Holmes occupied the house he took water from the spring in question by pumping it through a pump at the spring, and carrying the water in pails from there to his house. Holmes occupied the premises until about the year 1876, and from that time until March, 1878, Hosea Welch, 2d, rented the premises to different tenants who were supplied with water by pumping it from the spring in the same way that Holmes had been.

March 4, 1878, Hosea Welch, 2d, conveyed to his daughter Eliza, and her husband Lewis Keenan, the premises now owned by the defendant. The spring in question

was situated upon the premises so conveyed, and the deed of conveyance contained the following exception :

“Always excepting a spring of water which I reserve to myself, together with the right to enter upon said lands and take up and lay down logs to said spring.”

After the execution of this deed to Eliza and her husband, she continued to occupy the premises by herself and tenants until the spring of 1881. At that time a pipe was placed in the ground extending from the spring to the kitchen in the defendant's house, and a pump was attached to the pipe in the kitchen, and the water required for domestic purposes has been since then obtained from the spring through this pipe and pump.

The master found that when this pipe was laid from the spring to the house of the defendant, Eliza asked permission of her father, the owner of the orator's premises, to extend the pipe in that manner so that she could pump the spring directly into her house, and that Hosea Welch, 2d, told her she might put in the pipe and pump, but that it must not in any way interfere with his use of the spring, nor infringe on his right to take the water to his premises.

The said Eliza subsequently married Matthew Caldwell, and she and her husband on May 3, 1889, conveyed the defendant's premises to him. Said deed contained among other things the following, as a part of the description :

“All our right to have and take water from spring of water on said granted premises.”

Subject to the exception of the defendant, the orator was allowed to show that at the time of the execution of this conveyance to the defendant, the said Eliza objected at first to having anything written in with reference to the spring of water, and that she then told the defendant that she did not own any interest in the spring ; that her father gave her the right to pump the water from the spring to the house, but that it was only by word of mouth, and that her father re-

tained full control of the water, and had a right to stop them from using the water at any time.

The master did not find that the defendant had in any way befouled the spring, nor interfered with the orator's pipes in the spring, but did find that for three years last past the water had not run through the orator's aqueduct for some reason which he was unable to determine. He found that the defendant claimed to own the spring and had so notified the orator, and further found that there was sufficient water in the spring for both the orator and defendant.

The prayer of the bill was that the defendant be restrained from meddling with the water in the spring, or the pipes leading therefrom, or from in any way polluting or contaminating the water in said spring, and from interfering with the orator in cleaning and repairing the said spring and pipes.

Bates & May for the orators.

R. M. Harvey for the defendant.

ROSS, C. J. I. The defendant's exception to the master's report, because he received and considered the testimony of J. K. Darling, was properly overruled. His testimony was, that when he made the deed of the land on which the spring in controversy is located, to the defendant, her grantor told defendant that she did not own any interest in the spring ; that her father had given her verbal license to pump water from the spring to the house on the land being conveyed, but retained full control over the water, and had the right to stop the use at any time. The deed, then being made, conveyed to the defendant "all right" the grantors had "to take water from the spring on the granted premises." The deed does not define the right conveyed. It was proper to show what right the grantors claimed. This testimony did not

attempt to abridge, but to define the right conveyed. It also showed that the right conveyed was different from the right which the defendant claims in her answer. She there claims an absolute right, acquired by adverse use, by her grantors and herself, for more than fifteen years. This evidence also showed that the defendant was then informed that the use by her grantors was under a license from the common grantor of both parties, and for that reason not adverse to the orator's title to the spring. The defendant's counsel further contends that this evidence was erroneously received by the master, because neither the orator's title and right to use the spring, nor that of the defendant, were put in issue by the bill and answer. The bill is somewhat loosely drawn, and manifestly, mainly for the purpose of charging the defendant with polluting the spring, which is unsustained by the findings of the master. The bill, however, alleges that the orator and his grantors had enjoyed the free, uninterrupted, undisturbed possession of the spring for fifty or more years, and that he has the right to enter upon the land of the defendant to clean *his spring* and the pipes leading therefrom. It further alleges that the grantors of the defendant never claimed title to the spring, but that the defendant claims title to the land where the spring is located "including the spring in dispute." The answer denies that the grantors of the defendant never claimed title to the spring, and never used it except under a license from the common grantor of the parties, and then alleges that she and her grantors for more than sixteen years have by right used the water from the spring, and that such use has been open and under a claim of right. Hence, the facts alleged in both bill and answer fairly put in issue the rights of the respective parties to this spring of water.

II. The defendant further contends that the decree of the chancellor was erroneous, in that it confirms the orator's title to the spring of water, because the orator does not pray to

have his title thereto, and the defendant's rights therein, if any, ascertained and determined. The bill prays for an injunction restraining the defendant from meddling with the water in the spring or the pipes therefrom, from in any way fouling the water, and from interfering with the orator in cleaning and repairing the spring and the pipes leading therefrom, and for "such other and further relief as the nature of the case may require." The general prayer for relief, "such as the nature of the case may require," is sufficient to uphold any decree properly required, fully and effectively to dispose of the issues raised by the bill and answer. As we have shown, the bill and answer put in issue the rights of these parties, if not to the title to the spring, to the use of the water of the spring. The latter is not in legal effect different from their respective titles in and to the spring; for, the right to use the waters flowing from a spring arises out of the title to the spring. On the facts found the title to this spring is in the orator, with the right to enter upon the defendant's land at reasonable times, and in a reasonable manner, and do what is necessary to give him the use of the spring. This is his right under the conveyances from the common grantor, Hosea Welch, 2d. But Hosea Welch, 2d, when owning the orator's premises, and when conveying the defendant's premises to his daughter, who, with her husband, conveyed to the defendant, gave her verbal permission to take water from the spring in the manner it is now being taken, "but it must not in any way interfere with his use of the spring, nor infringe on his right to take water to his premises"—the premises now owned by the orator. The daughter acted upon this parol license, and put in the pump and pipe now in use. She, under the license from her father, acted upon by her, under the decision of *Clark v. Glidden*, 60 Vt. 702, had the right to use the water from the spring in the manner she then entered upon its use, but so as not to infringe upon her father's right until after she

had realized the full benefit of the expenditure incurred, or until the pipe and pump then put in were fairly worn out. Then the license can be revoked. But her exercise of this right must be of such a character as not to interfere with the use then made of the water of the spring by her father. This right of the daughter has come to the defendant, and the right of the father has come to the orator. The defendant had, on one occasion, denied the orator the right to enter upon her premises to clean and repair the spring and pipe, and had made some threat, looking to the pollution of the water. Under the pleadings and facts found it was proper, not only to confirm the orator in his title to the spring of water, but to enjoin the defendant from interfering with his use of the spring, it not being found that the orator had made or claimed to make any improper use of his title to the spring, or the water thereof, nor to interfere with the defendant's right to use the water under the terms of the license.

Decree affirmed and cause remanded.

B. F. HAMILTON v. J. A. GRAY.

OCTOBER TERM, 1894.

Champerty. Agreement to collect claim for one-half recovery. Evidence.

1. A champertous agreement is void and not enforceable in this state.
2. An agreement to receive and collect certain notes for one-half of what may be collected is champertous.
3. The question being whether the sum claimed by the plaintiff for serving a writ as deputy sheriff was more than the legal fees, the defendant may be asked on cross-examination whether he knows any reason why that charge is not correct.
4. As tending to show that the plaintiff was entitled to recover his fees for attending as a witness in a suit of the defendant, the clerk's taxation of the defendant's costs in that suit, in which the attendance of the plaintiff was taxed, is admissible.

General assumpsit. Pleas, the general issue, payment, and offset. Trial by jury at the February term, 1894, Orleans county, ROWELL, J., presiding. Verdict for the plaintiff and judgment thereon. The defendant excepts.

The plaintiff claimed to recover, among other things, twenty dollars for services in collecting a note against one P. Morey. In reference to this item his testimony tended to show that he had made a contract with the defendant to collect certain notes, he to receive one-half of what might be

collected by way of compensation therefor. Among these notes was the note of said Morey for one hundred twelve dollars and sixty-seven cents. The plaintiff began suit upon this note in the name of the defendant, which Morey resisted upon the ground that the claim was barred by the statute of limitations. Subsequently the defendant settled the case with Morey for forty dollars, and the plaintiff claimed to recover one-half of this sum. He testified that he made no claim in respect to said note, except by virtue of the aforesaid contract.

This contract was in writing, and was as follows ;

"This is to certify that I have this day put into the hands of B. F. Hamilton, deputy sheriff, the following notes for collection, which I agree to take one-half of the amount he may get on any or all said notes and release him from the same ; and the said Hamilton is to make no charge to me for collecting them only the one-half he may collect.

"MORGAN, VERMONT, May 29th, 1886."

(Then follows a list of seventeen claims against different persons, among which are the following) :

E. B. Peckham, \$9.74.

P. Morey, \$112.67.

Royal Moody, \$149.57.

"N. B. The said Hamilton has power from me to settle any of the above notes to the best of his judgment, and I am to take one-half of what he gets and release him from the same.

J. A. GRAY."

"Received of J. A. Gray the following notes which I agree to try and collect to the best of my ability, and am to have one-half of all I get on them, and have the power to settle any of them as I think best, and the said Gray hereby agrees to take one-half of what I get and discharge me from the same.

B. F. HAMILTON.

"MORGAN, VT., May 29th, 1886."

The other questions raised sufficiently appear in the opinion.

Dickerman & Young for the defendant.

The contract under which the plaintiff claims to recover in respect of Morey note was champertous, and no recovery can be had upon it. 2 Bacon's Ab., 183; 2 Bl., Com., 135; 4 Kent's Com., marginal page 447 and note d; 1 Repal. L. Dic., 192; 1 Bouvier's L. Dic., 250; *Stanley v. Jones*, 7 Bing. 369; *Stevens v. Bogwell*, 15 Vesey 139.

A champertous agreement cannot be supported either in law or equity. 2 Bacon's Ab., 187; *Arden v. Patterson*, 5 Johns Ch. 44; *Merritt v. Lambert*, 10 Paige Ch. 352; *Re Blakely*, 5 Paige Ch. 311; *Knox v. Martin*, 3 N. H. 154; *Martin v. Clark et al.*, 8 R. I. 389; *Lathrop v. Amherst Bank*, 9 Met. 489; *Ackert v. Barker*, 131 Mass. 436; *Laney v. Havender*, 146 Mass. 615; *Nickels v. Kane*, 82 Va. 309.

E. A. Cook for the plaintiff.

The contract in issue was not champertous in this state. Our statute provides what is champerty. R. L., chap. 200; *Danforth v. Streeter*, 28 Vt. 490.

In order to render a contract champertous the subject matter of it must be a suit either in existence or in contemplation. 3 Am. & Eng. Enc., 69; *Danforth v. Streeter*, 28 Vt. 490.

TAFT, J. Champerty is an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail—the champertor to carry on the suit at his own expense. This doctrine is based upon the ground that no encouragement should be given to litigation by the introduction of a party to enforce those rights which the owners are not disposed to prosecute. The agreement in this cause is fully within the definition above given. The plaintiff took the claims under an agreement with the defendant to divide between them all that could be collected.

He was to be at the expense of collecting the claims, making no charge to the defendant for so doing. It is argued by the plaintiff that the subject matter of a champertous agreement must be a suit, or that one must be in contemplation. Conceding this to be true, we think a suit to enforce the claims fairly within the contemplation of the parties to the agreement. The plaintiff took the claims for collection, and under the agreement he had the right to bring suits, if necessary, to collect the claims, and it is fair to infer the parties had in mind that in the collection of a large number of evidently poor, and some outlawed, claims, suits would become necessary. A champertous agreement was void at common law, and we think the common law as to champerty is in force in this state. It is applicable to our situation and circumstances, and not repugnant to the laws. R. L., s. 689.

The subject of champerty has been referred to in several cases in our reports, *Danforth v. Streeter*, 28 Vt. 490; *Gregory v. Gleed*, 33 Vt. 405; *Dorwin v. Smith*, 35 Vt. 69; but in none of these cases were the agreements champertous, there being no element of the offence in any of the contracts involved in the litigation. In *Dorwin v. Smith*, the contract was between parties who had a mutual interest in the result of the suit. In *Gregory v. Gleed*, the contract was a guaranty by an attorney that he would pay the claim if placed in his hands for collection. In *Danforth v. Streeter*, Redfield, J., discusses the doctrine to some extent, and says that he is reluctant to believe that the common law offence of champerty had been adopted as part of the law of this state, but adds "there are probably other things—than the sale of a chose in action—coming more nearly to the idea of the common law definition of champerty, such as carrying on suits for a share of the avails, and thereby increasing litigation which the law will still regard as champertous and not countenance." The case then under consid-

eration was the sale of a chose in action, in suit at the time of the sale, and there was no occasion for the discussion of the rule as to champerty.

The case at bar is strictly within the statement of the case that Redfield, J., intimates may still be regarded as champertous and not countenanced, viz., carrying on suits for a share of the avails.

The words "purchase" and "sale" have been indiscriminately used in connection with the term "champerty," and such use has bred confusion in the books. As above stated, champerty is an agreement by one to take a suit or claim, and at his own expense gather in the spoils, dividing them with the owner. It does not imply a purchase; the word "purchase" means to buy by paying a price, and implies a payment. *Curtis v. Burdick*, 48 Vt. 166. A purchase is that which is obtained for a price in money or its equivalent. Web. Dic.

The doctrine of champerty was fully recognized and applied in *Wright v. Whithead*, 14 Vt. 268, in which case the court, by Williams, C. J., said :

"The orator purchased this suit under an agreement to divide whatever sum should be recovered. If he succeeded he was to pay one hundred and fifty dollars; if he failed he was to pay nothing. This was a species of champerty or maintenance which cannot be countenanced in a court of equity."

We have here the same misuse of the word "purchase," for the party made no purchase of the claim; he paid nothing for it, but took a conveyance of it, and agreed to pay one hundred and fifty dollars if he recovered, and was to pay nothing if he failed. The rule is the same at law as in equity.

The contract under consideration being champertous and void, no recovery can be had under it. The other questions arising upon this branch of the case become immaterial, and are not passed upon.

There are two other questions in the case. One item in the plaintiff's specifications is the sum of two dollars and eighty cents (\$2.80), his fees as deputy sheriff for serving a writ in favor of the defendant against one Caswell. The question at issue was, whether the sum charged was more than the legal fees for the service. The only point reserved was the objection made to a question in cross-examining the defendant. He was required to answer whether he knew any reason why the fees of two dollars and eighty cents (\$2.80) as charged was not correct. His answer was that he did not.

The plaintiff had the right to examine the defendant under the rules applicable to the cross-examination of witnesses. R. L., s. 1009. There was no error in requiring the defendant to state that he knew nothing upon the subject. If he did know aught in relation to it, the plaintiff had the right to have him state it. It logically follows then that he had the right to inquire of the defendant if he did know anything in regard to the matter.

Another item claimed by the plaintiff was one dollar and sixty cents (\$1.60), for his attendance as a witness in a suit in favor of the defendant against one Howard. The question reserved in relation to this item was whether the clerk's taxation of costs in the suit, which included the attendance of the plaintiff as a witness, was admissible in evidence. The fact that the fees for the attendance of the plaintiff as a witness were taxed in behalf of the defendant had a tendency to show that the plaintiff did attend as a witness, and the evidence of the taxation was properly admitted.

Although it did not appear in the case that neither the defendant nor his counsel were present at the taxation, nor that the notary before whom the voucher of the plaintiff's attendance was sworn to was in anyway connected with the case, we presume the taxation was made with the defendant's knowledge. The defendant had the benefit of it, and

he cannot now say that the taxation is no evidence of the fact which was the very basis of including the claim in the taxation.

Judgment reversed and cause remanded.

STATE v. DANIEL SAWYER.

OCTOBER TERM, 1894.

Exception must be taken. Intoxicating liquor. Second offence.

1. There must be an exception to the admission of evidence in order to raise the question in supreme court; a mere objection is not enough.
2. In a prosecution under R. L., s. 3802, as amended by No. 42, Acts 1888, for keeping intoxicating liquor with intent to sell, a previous conviction for selling may be shown to enhance the penalty.

Information charging the respondent with keeping intoxicating liquor, with intent to sell the same in violation of law. Plea, not guilty. Trial by jury at the June term, 1894, Addison county, START, J., presiding. Verdict, guilty. Judgment on verdict and sentence imposed. The respondent excepts and execution stayed.

In reference to the admission of testimony the exceptions stated :

“The state, in order to show whether the liquor and contents of the bottles so found was intoxicating, improved as a witness said town liquor agent, who was asked the following question : Question—Did Mr. Cobb, the deputy sheriff, deliver to you last December some bottles and barrels of bottles? which question was seasonably objected to and admitted.”

The other question decided appears in the opinion.

J. M. Slade for the respondent.

The offences of keeping with intent to sell and selling are distinct ; therefore, a conviction for one cannot be shown to enhance the penalty upon a trial for the other. *State v. Lincoln*, 50 Vt. 644 ; *State v. Jangraw*, 61 Vt. 3 ; *State v. Locklin*, 59 Vt. 634 ; *State v. Woods*, 68 Me. 409 ; *Commonwealth v. Marchaud*, 155 Mass. 8.

F. L. Fish, State's Attorney, for the state.

R. L., s. 3802, creates but one offence, although that offence may be committed in different ways. *State v. Remalee*, 36 Vt. 672 ; *State v. Freeman*, 27 Vt. 523 ; *Kelley v. The People*, 115 Ill. 583.

THOMPSON, J. I. No exception was taken to the admission of the question objected to by the respondent, and therefore the ruling of the county court cannot be passed upon by this court.

II. The information charged the respondent with keeping and possessing intoxicating liquor with intent to sell and furnish the same in violation of law, and also alleged his prior conviction for selling and furnishing intoxicating liquor contrary to law. On trial, the record of such prior conviction was admitted in evidence to enhance the sentence,

against the respondent's exception. The respondent was found guilty by the jury as of a second conviction, judgment rendered upon the verdict, and respondent sentenced to imprisonment in the House of Correction for ninety days, and to pay a fine of two hundred dollars and costs of prosecution, with the alternative sentence, to which he excepted.

The respondent contends that the conviction should be set aside because of the admission in evidence of the record of his prior conviction for selling and furnishing, and insists that only a record of his conviction for keeping with intent to sell and furnish could be admitted in this prosecution to increase the penalty.

R. L., s. 3802, as amended by St. 1888, No. 42, s. 1, is as follows :

"If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps, or possesses with intent to sell, furnish, or give away intoxicating liquor or cider in violation of law, he shall forfeit for each offence to the state, upon the first conviction, not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court, not more than thirty days ; upon the second and each subsequent conviction not less than ten nor more than two hundred dollars, and shall be imprisoned not less than one month nor more than one year."

This statute does not impose the increased penalties for a second or subsequent conviction for the *same offence*, but for a *second or subsequent conviction* for selling, furnishing or giving away, or owning, keeping, or possessing with intent to sell, furnish or give away, in violation of law, intoxicating liquor or cider in violation of the act. "These are different forms of committing the same legal offence, violating the act." In thus holding we follow *State v. Haynes*, 36 Vt. 667, which in principle is decisive of this case. A conviction for violating the statute in one of these forms is available to enhance the penalty on a subsequent conviction

for a violation in another. As was said by Poland, C. J., in *State v. Haynes, supra*,

“It is equally within the intent and purpose of the law to punish offenders so incorrigible and hardened as not to desist, after one chastisement for their breach of law.”

Judgment that there is no error in the proceedings of the county court, and that respondent take nothing by his exceptions. Let execution of sentence be done.

I. P. TITUS v. W. E. WARREN AND TRUSTEE.

OCTOBER TERM, 1894.

With what debts homestead can be charged. Right to waive items of account.

1. When the plaintiff seeks to charge the homestead of the defendant with the judgment to be obtained, he may waive those items in his account which accrued subsequently to the acquiring of the homestead.
2. It is the *existence* of the cause of action, and not whether the demand is due which determines the liability of the homestead.

General assumpsit. Heard upon an agreed statement of facts at the June term, 1894, Caledonia county, TYLER, J.,

presiding. Judgment against the principal defendant, and that the trustee is holden. The trustee and claimant except.

The debt due from the principal defendant to the trustee was for the purchase price of the defendant's homestead, and the question was whether this fund was attachable upon the plaintiff's debt. The defendant acquired his homestead April 20, 1889. The plaintiff's account was a store bill which accrued from 1886 to 1891. Upon the trial the plaintiff was allowed, against exception, to waive all those items which accrued after April 20, 1889.

The plaintiff's account continued to be an open book account until after the date of acquiring the homestead, and items of both debt and credit entered into it after that date.

W. H. Taylor for the trustee and claimant.

The debt due on mutual book accounts is the balance, and in this case the balance recovered was not fixed until after the homestead was acquired. *Abbott v. Keith*, 11 Vt. 528; *Hodge v. Manley*, 25 Vt. 213; *Bunnett v. Pinto*, 2 Conn. 213; *Avery v. Fitch*, 4 Conn. 362; *Slone v. Austin*, 9 Mo. 558; *Penn v. Watson*, 20 Mo. 16; *Ring v. Jamison*, 2 Mo. App. 591.

The plaintiff could not avoid the effect of this by omitting the items which accrued after the acquiring of the homestead. *Herren v. Campbell*, 19 Vt. 24; *Danforth v. Streeter*, 28 Vt. 494; *Carpenter v. Pier*, 30 Vt. 89; *Hassam v. Hassam*, 22 Vt. 519; *Wing v. Hulburt*, 15 Vt. 607; *Pratt v. Gallup*, 7 Vt. 344.

B. E. Bullard for the plaintiff.

The plaintiff was properly allowed to omit from the judgment the items as to which the homestead was not attachable. *Sibley v. Johnson*, 43 Vt. 67; *Foot v. Ketchum*, 15

Vt. 258; *Downer v. Bank*, 39 Vt. 25; *Knapp v. Sturgis*, 36 Vt. 721; *Walker v. Sargent*, 14 Vt. 247; *Lyman v. Tarbell*, 30 Vt. 463; *Wheeler v. Winn*, 38 Vt. 122; *Gerren v. Campbell*, 19 Vt. 23; *Danforth v. Streeter*, 28 Vt. 490; *Carpenter v. Pier*, 30 Vt. 81.

START, J. In the court below the trustee was adjudged liable, on account of money due and owing from him to the principal defendant for a homestead conveyed to him by the defendant; and the case comes to this court on exceptions taken by the trustee and claimant, who claim that the sum thus due is exempt from attachment by trustee process.

The plaintiff in his specification set out several items of account, some of which accrued before and some after the homestead was acquired. The court properly allowed the plaintiff to waive his right of recovery upon items of his account which accrued subsequent to the time the defendant acquired his homestead, and rendered judgment against the principal defendant for only such causes of action as existed at the time of acquiring the homestead. It is clear that the judgment is founded upon a cause of action which existed at the time the homestead was acquired. The judgment being founded upon such cause of action, the funds in the hands of the trustee were subject to attachment by trustee process.

R. L., s. 1076, relied upon by the trustee and claimant, exempts from attachment by trustee process such sums only as are due and owing to the principal defendant for property sold and conveyed by him, which was, at the time of the sale, exempt from attachment and levy upon execution. R. L., s. 1901, expressly provides that the homestead of the debtor shall be subject to attachment and levy upon execution upon causes of action existing at the time the homestead was acquired.

The authorities cited in support of the claim that a cause of action accrues at the date of the last item of an account,

have no application to this case. The causes of action for which the plaintiff recovered judgment against the principal defendant all *existed* before the date of the last item on the specification, and before the homestead was acquired. The *existence* of the cause of action at the time the homestead was acquired determines the right of the plaintiff to attach the funds in the hands of the trustee. The statutes above cited make the right to depend upon the existence of the cause of action, and not upon whether the demand is due, so that an action could be maintained at the time the homestead was acquired.

Judgment affirmed.

CHARLES A. STILES

v.

HEMAN STANNARD ET AL.

OCTOBER TERM, 1894.

Equity. Payee of note not bound to resort to surety for payment.

The Paragon Marble Company, being indebted to the orator in the sum of \$2,500, induced him to give his mortgage note to the defendant Stannard, who advanced him the money for that amount upon the agreement of the company to pay the note when due. The other defendants, who were the principal stockholders in the marble company, and interested that the arrangement should be consummated for that reason, agreed with Stannard to indemnify him against loss on the note, but did not agree with the orator to pay it. *Held*, that the orator could not compel Stannard to resort to the other defendants first, nor the other defendants to pay the note.

Bill in equity. Heard upon the report of a special master at the March term, 1894, Rutland county. MUNSON, Chancellor, dismissed the bill with costs to the defendants. The orator appeals.

The orator alleged in substance that the Paragon Marble Company had contract rights in certain real estate belonging to him, and owed him in respect of said contract the sum of three thousand dollars; that said company was unable to pay the amount so due, and that for the purpose of paying

the same and thereby of saving their rights in said property they applied to the defendant Stannard, and procured from him a loan of two thousand five hundred dollars, which was paid to the orator upon such account; that for the purpose of securing said loan it was agreed that the defendant Stannard should take the orator's note for two thousand five hundred dollars, secured by mortgage upon the real estate in question, and that the marble company, upon the maturity of said note, should pay the same; that the other defendants were the stockholders of the Paragon Marble Company; that it was for their interest, for this reason, that the arrangement should be consummated, and that for the purpose of effecting the same they also agreed with the orator to pay said note when due; that the defendant Stannard knew the purpose of the loan; that the marble company and the other defendants were the parties in interest upon the notes, and assented thereto.

The prayer of the bill was that the defendant Stannard should be restrained from prosecuting any suit of foreclosure against the premises until he had exhausted his remedy against the other defendants, and that the other defendants be ordered to pay said note.

The master found the facts as alleged by the orator in reference to the giving of the note, and the agreement of the Paragon Marble Company to pay the same. He did not find that the other defendants agreed with the orator to pay said note, but that they agreed with the defendant Stannard to indemnify him against loss by reason of the taking of said note and mortgage.

Henry A. Harman for the orator.

This arrangement, by which the two thousand five hundred dollars was borrowed of Stannard for the purpose of paying the orator's debt, was made by the other defendants,

who were stockholders and officers in the corporation, and who were really the parties in interest. In equity they ought to pay the note. They were in effect co-sureties upon the note, the orator having signed at their request and for their benefit. *Blake v. Cole*, 22 Pick. 97; *Apgar v. Hiler*, 24 N. J. L. 812; *Mickley v. Stocksleger*, 10 Pa. 345; *Hayden v. Thrasher*, 28 Fla. 162; *Ranelaugh v. Hayes*, 1 Vernon, 189; *Bishop v. Day*, 13 Vt. 81; *Ferrer v. Barrett*, 4 Jones Eq. 455.

J. C. Baker for the defendant.

The guaranty of the other defendants was not with the orator, but with the defendant Stannard, and was to indemnify him against loss. The orator can claim no benefit by reason of this contract between Stannard and the other defendants. *Forest Oil Company's Appeal*, 118 Pa. St. 138; *Skinner v. Tirrell*, 159 Mass. 474; *Morrison v. Bank*, 65 N. H. 253; *Liles v. Rogers*, 113 N. C. 197.

THOMPSON, J. The orator, Charles A. Stiles, seeks to be relieved from the payment of his note and mortgage executed and delivered to the defendant, Heman Stannard.

Among other things, the master finds that on the first day of October, A. D. 1885, the Paragon Marble Company, a corporation, was in possession of a marble quarry on the orator's land, which it was then operating under the terms of a bond executed and delivered by the orator to one L. W. Collins, and an extension thereof executed and delivered by him to the Paragon Marble Company as the assignees of the bond. By the terms of the bond and the extension thereof the corporation was to pay the orator three thousand dollars, October 1, 1885. When that day arrived it had no money with which to make this payment.

The defendants, Erastus H. Phelps, George M. Fuller, L. W. Collins and L. B. Smith, were the principal stock-

holders of the corporation, and Fuller was the president, and Phelps was the treasurer. Defendant Stannard was never a stockholder of the corporation.

Being unable to make the payment on the last named day, the corporation, by its officers, asked the orator for further delay, and not to enforce the conditions of the bond; and they also informed him that defendant Stannard would not invest any money in the business of the corporation, but that he would loan two thousand five hundred dollars, and they proposed to the orator that he should give his note to Stannard for two thousand five hundred dollars, and secure the same by mortgage upon the property described in the bond, agreeing that the corporation should pay the note when it became due, and that it should pay the balance of the three thousand dollars, viz., five hundred dollars, in one year with interest. Relying upon this agreement of the corporation, the orator executed and delivered the note and mortgage to Stannard and received from him two thousand five hundred dollars, and permitted the corporation to remain in the possession and control of the quarry. This agreement of the corporation to pay this note was not in writing, but the master expressly finds that such was the understanding between the officers of the corporation and the orator, Charles A. Stiles, and that without it he would not have given the note and mortgage, nor have extended the time for the payment of the three thousand dollars. When the note fell due the corporation did not pay it, and has never paid it.

Stannard was not satisfied to take the mortgage as security for the loan, and thereupon the other defendants executed and delivered to him an agreement to indemnify him against loss in case the mortgage security was insufficient to pay the note.

The orator predicates his right to be relieved from the payment of the note and mortgage, upon the allegation in

his bill, that at the time the note and mortgage were given to Stannard, the other defendants gave him a contract in writing agreeing to pay him the two thousand five hundred dollars with interest thereon, when the same became due; but the master finds that they did not make such a contract, and that they only made the contract of indemnity in respect to the adequacy of the mortgage security before mentioned. The master finds no fact which disentitles Stannard to enforce the note and mortgage. It is found that the corporation and not the other defendants agreed to pay the note at its maturity. The corporation is not a party to this suit. So far as disclosed by any papers furnished this court, there is no allegation of facts in the bill which, if found, would charge any of the defendants as stockholders of the corporation with the payment of this note, and that question is not before us, either by the allegations of the bill or the findings of the master. The bill was properly dismissed with costs to the defendants.

Decree affirmed and cause remanded.

SARAH L. WOODBURY

v.

W. E. WARREN, TRUSTEE, AND CLAIMANT.

OCTOBER TERM, 1894.

Homestead. House in process of erection.

1. A dwelling house in process of erection may be exempt from attachment as a homestead.
2. The rule stated in *Rice v. Rudd*, 57 Vt. 6, affirmed.

Assumpsit by trustee process. Heard at the June term, 1894, Caledonia county, TYLER, J., presiding, upon an agreed statement of facts. Judgment against the principal defendant and trustee. The trustee and claimant except.

W. H. Taylor for the trustee and claimant.

The house was exempt as a homestead although not completed. *Lamb v. Mason*, 45 Vt. 502; *Spaulding v. Crane et al.*, 46 Vt. 298; *Rice v. Rudd*, 57 Vt. 11; *Reske v. Reske*, 51 Mich. 541; *True v. Morrill*, 28 Vt. 674; *McClarey v. Bixby*, 36 Vt. 254; *Fewett v. Guyer*, 38 Vt. 218; *Finnegan v. Prinderville*, 83 Mo. 517; *Skouton v. Wood*, 57 Mo. 380; *Shindler v. Givens*, 63 Mo. 394; *Meinzer v. Diveling*, 66 Mo. 375; *Howard et al. v. Logan*, 81 Ill. 383.

B. E. Bullard for the plaintiff.

There can be no homestead without a house fit for occupancy. *Keys v. Bump's Admr.*, 59 Vt. 391; 2 Bouvier Law Dict., Tit. Homestead, p. 754; *Spaulding v. Cram*, 46 Vt. 292; *Bugbee v. Bemis*, 50 Vt. 216; *True v. Estate of Morrill*, 28 Vt. 672; *Hamford v. Holdman*, 16 Bush. 210; *Lee v. Miller*, 11 Allen 37.

THOMPSON, J. The defendant bargained for a building lot in the village of Hardwick in the fall of 1888, and the deed thereof was executed and delivered to him April 20, 1889, and on the same day was filed in the town clerk's office in Hardwick. About the date of the deed the defendant began the erection of a dwelling house on the lot, and the same was in process of erection during the spring and summer of 1889. The defendant moved his family into this house in December, 1889. He has had no other real estate before nor since he took the deed of this.

The plaintiff's cause of action is for rent due her from defendant for the use of her tenement for the months of June and July, 1889, and which fell due August 1, 1889. This indebtedness was created and fell due while the defendant's house was in process of erection. This action was commenced August 9, 1893.

The fund in the trustee's hands is a balance of a note dated July 29, 1893, given by him to the defendant in part payment of the purchase price of this house and lot.

The plaintiff concedes that under R. L., sec. 1076, this fund is exempt from attachment by trustee process, if at the time this indebtedness was created the house and lot were defendant's homestead. We therefore construe the agreed statement of facts as raising this question, no other having been argued by counsel on either side.

The plaintiff contends that while the house was in process

of erection the defendant had no homestead in the lot, and that none could accrue until the house was ready for occupation.

In *West River Bank v. Gale*, 42 Vt. 27, and *Lamb v. Mason*, 45 Vt. 500, it was held that the homestead of a debtor was exempt from attachment upon debts contracted after the filing of the deed of the homestead for record in the town clerk's office, and before the occupation of the premises by the debtor as a homestead, he being in the occupancy of the same as a homestead at the time of the attachment. The plaintiff attempts to distinguish these cases from the one at bar, in that there was no house upon the premises involved in the latter case at the time the deed was filed in the town clerk's office, nor at the time when the defendant's debt to her was contracted, and relies upon R. L., s. 1894, in support of this contention. S. 1894 is as follows:

"The homestead of a housekeeper or head of a family, consisting of a dwelling house, outbuildings, and the land used in connection therewith, not exceeding five hundred dollars in value, and used or kept by such housekeeper or head of a family as a homestead shall, together with the rents, issues, profits and products thereof, be exempt from attachment and execution, except as hereinafter provided."

Considering the humane purpose of the homestead law, it is too narrow a construction of it to hold that under no circumstances can the debtor's real estate become a homestead, exempt from attachment, unless there is a dwelling house actually erected upon it. In *Rice v. Rudd*, 57 Vt. 6, it was said that "to constitute a homestead within the protection of the exemption law, there must be a dwelling house upon the land owned by the housekeeper, or one in process of erection, and actually used or set apart and kept for a home and abiding place for the family." This is the correct construction of the statute. Therefore, as against the plaintiff, the lot and house in process of erection thereon, when

defendant's debt to the plaintiff was contracted, were then the defendant's homestead, and exempt from attachment for that debt.

Judgment affirmed, without costs as to the defendant. Judgment as to trustee and claimant reversed, and judgment that trustee is discharged with costs, and that claimant is entitled to the funds in the trustee's hands.

J. K. BATCHELDER v. JOHN F. BARBER.

OCTOBER TERM, 1894.

Statute of limitations. Absence from the state. Known attachable property.

To avoid the statute of limitations upon the ground that the defendant, while residing without the state, had no known attachable property within the state, the plaintiff must affirmatively show that fact.

Assumpsit. Plea, the general issue, with notice of statute of limitations. Heard upon the report of a referee at the June term, 1894, Bennington county, TAFT, J., presiding. Judgment *pro forma* for the plaintiff. The defendant excepts.

Stewart & Wilds for the defendant.

The burden is upon the plaintiff to show that the defendant had no attachable property in Vermont while absent from the state. *Stevens v. Fisher*, 30 Vt. 200.

O. M. Barber for the plaintiff.

TAFT, J. Two questions were argued in this cause by the counsel for the defendant, but it is unnecessary to consider them, for the plaintiff concedes that he cannot recover the amount of the draft in question, for that it does not appear that the defendant while residing without the state did not have known property within the state that could have been attached by the common process of law. To entitle him to recover, it was necessary he should establish that fact. *Stevens v. Fisher*, 30 Vt. 200.

Judgment reversed, and judgment for the plaintiff for the smaller sum named in the report.

L. C. LEAVINS, GUARDIAN,

v.

LOVINA EWINS ET AL.

OCTOBER TERM, 1894.

Probate court cannot correct error of law in its decree.

An error of law in a decree of the probate court distributing the estate of a deceased person should be corrected by appeal, and if no appeal is taken the decree establishes the law of that case, and cannot be subsequently altered by the probate court.

Petition to the probate court for the district of Franklin, praying for the correction of an error in its decree distributing the estate of Lewis Ewins. The probate court granted the relief asked for, and the petitioners appealed. Heard at the April term, Franklin county, 1894, TAFT, J., presiding, upon the motion of the appellants to dismiss the petition. Petition dismissed and exceptions by the petitioners.

H. C. Adams and J. J. Hill for the petitioners.

H. Elmer Wheeler for the petitionees.

The probate court cannot correct errors of law in its decrees. That can only be done by appeal. *Scott v. Stewart*, 5 Vt. 57; *Mosseaux v. Brigham*, 19 Vt. 457; *Smith v.*

Howard, 41 Vt. 74 and note; *Haynes v. Kimpton*, 47 Vt. 46; *Ins. Co. v. Partridge*, 49 Vt. 121; *Nixon v. Phelps*, 29 Vt. 198.

START, J. In 1874, the probate court for the district of Franklin made a decree, distributing the estate of Lewis Ewins under his will, by which the executor of the estate was ordered to pay to Rosabella, Lovina and Zenobia Ewins, in equal parts, the residue of the personal estate. From this decree no appeal was taken. In 1893, and after the decease of Rosabella Ewins, this petition was brought, praying the probate court to correct the decree of 1874 by striking out the words "in equal proportions" therein, thus making the three legatees joint owners of the personal estate instead of owners in common.

In making the decree of 1874, the probate court undertook to decree the estate according to the legal effect of the will. It had jurisdiction to make a decree distributing the estate, and its decree unappealed from was binding upon all parties. The construction given to the will was a legal construction, and became the law governing the distribution of the estate. If there was an error in the distribution of the estate, it was an error of law; and the remedy was by appeal to the higher court. No appeal having been taken, the law as then interpreted by the court became the law of the case. The construction thus given to the will was a judicial construction. Property rights vested under it; and, for error in that construction, they cannot now be disturbed. *Stone v. Peasley*, 28 Vt. 716, and cases there referred to.

Judgment affirmed; cause certified to the probate court.

TOWN OF SANDGATE v. TOWN OF RUPERT.

JANUARY TERM, 1894.

Pauper. Support by one town within limits of another.

In 1874, the pauper was ordered to remove from the plaintiff to the defendant town. Before he actually removed the defendant took charge of him, and supported him in plaintiff town until 1891. *Held*, that the residence of the pauper from 1874 was in legal effect in defendant town, that he was transient in plaintiff town, and that plaintiff could recover.

Assumpsit for the support of a pauper. Heard upon an agreed statement of facts at the June term, 1893, Bennington county, THOMPSON, J., presiding. Judgment *pro forma* for the plaintiff. The defendant excepts.

The name of the pauper was Fred Conkey, and the agreed statement of facts, so far as is material, was as follows:

“The said Conkey was thirty years old in July, 1892, was born in Hebron, in the state of New York, was the son of William Conkey, and grandson of Nathaniel Conkey. William Conkey died in Sandgate before June, 1874; his wife, the pauper’s mother, had deceased about eight years before in the town of Arlington, at which place they were then living and keeping house, and Fred was then living with them. At the time William died he had no legal settlement in Sandgate under the then law. After the death of the pauper’s mother, pauper lived some of the time with his grandfather in Sandgate, and some of the time in other places. Nathaniel Conkey came to Sandgate to live about

1877, and lived there to the time of his death, which was in 1892.

"Prior to living in Sandgate he had resided in Rupert, and his legal settlement was in Rupert at the time he moved to Sandgate. At the time of William's death his legal settlement was in Rupert.

"On the first day of July, A. D. 1874, at Sandgate, before William R. Hoyt and Walter B. Randall, justices of the peace, on complaint of Morehouse Hamilton, overseer of the poor of the town of Sandgate, a court of examination was held under the law at that time and pursuant thereto.

"It was among other things then and there adjudged by said court, that Frederick Conkey, the pauper in question, had come to reside in Sandgate, and had not gained a legal settlement therein; that he belonged to and had his legal settlement in the town of Rupert; that he ought to be removed to Rupert as required by law; and pursuant to law said court ordered and directed that he be removed to the said town of Rupert.

"Before the pauper was removed to Rupert under the order, the latter town, in said month of July, accepted him, and has supported him as a pauper from then until April 1, 1891. Rupert has so supported him by contract in the town of Sandgate substantially all the time in the family of Nathaniel Conkey. The pauper was, however, supported and kept a few weeks by Rupert in the town of Rupert. The pauper has always held himself subject to the direction of Rupert as to where he should be kept, and he has, while supported by Rupert, lived in Sandgate as stated, because it was more economical for Rupert to so support him there. The requisite notice, preliminary to bringing this suit, was given. The town of Rupert refused to support the pauper after April 1, 1891, and the town of Sandgate has supported him from that date to the date of the writ in this cause. Except as herein stated, the pauper never lived in the town of Rupert."

Fayette Potter for the defendant.

The pauper had no three years' residence in Rupert, nor was he transient in Sandgate. Hence the plaintiff cannot recover. *Worcester v. East Montpelier*, 61 Vt. 139.

O. M. Barber for the plaintiff.

The residence of the pauper after 1874 was, in contemplation of law, in the defendant town. Certainly he had no residence in the plaintiff town. *Vershire v. Hyde Park*, 64 Vt. 638; *Barnet v. Ray*, 33 Vt. 211; *Leicester v. Brandon*, 65 Vt. 544.

START, J. It appears from the agreed statement of facts that the pauper in question was, on the first day of July, 1874, ordered to remove to the defendant town. Before he was removed the defendant accepted him and supported him in the plaintiff town, except for a few weeks while he was supported in the defendant town by the defendant, until April 1, 1891, when the defendant refused to longer support him. The pauper has always held himself subject to the direction of the defendant as to where he should be kept, and he lived in the plaintiff town while he was being supported by the defendant, because it was more economical for the defendant to support him there. Upon these facts it is held by a majority of the court that it is fairly inferable that, while the pauper was being supported in the defendant town by the defendant, he went to the plaintiff town by the procurement of the defendant; that the case falls within the rule laid down in *Leicester v. Brandon*, 65 Vt. 544, and that, in legal contemplation, the pauper's residence was in the defendant town when the defendant refused to longer support him; and that he was a transient person in the plaintiff town, and therefore the plaintiff is entitled to recover.

I do not concur in this holding. It does not appear that the pauper ever resided in the defendant town for three years, maintaining himself and family. In an action under our statute relating to the support of paupers, I think that no recovery can be had, unless it appears that the defendant

town is the town where the pauper last resided for three years, maintaining himself and family. No. 42, of the Acts of 1886, s. 13. I do not think it can fairly be presumed, from the fact that the pauper was supported for a few weeks by the defendant in the defendant town at some time between 1874 and 1891, that he went there and returned to the plaintiff town by the procurement of the defendant. I do not think that, in legal contemplation, the pauper's residence was in the defendant town when the defendant refused to longer provide for him, or that he was a transient person in the plaintiff town.

The pauper had come to the plaintiff town to reside when the order of removal was made. The order of removal conclusively establishes this fact. He has not since changed his residence, nor has he since come to want. Since he came to want in 1874 in the plaintiff town, his wants have been provided for by the plaintiff or defendant in the plaintiff town, with the exception of a few weeks while he was provided for by the defendant in the defendant town. His stay in the defendant town appears to have been temporary, and, in my judgment, there is nothing in the case that tends to show that he went there to reside. No question is, or can be made, but that he resided in the plaintiff town when he first came to want, and this residence is presumed to continue until the contrary is shown.

I think the case comes fairly within the rule laid down in *Worcester v. East Montpelier*, 61 Vt. 139, and *Chittenden v. Barnard*, 61 Vt. 145. In *Worcester v. East Montpelier*, *supra*, the pauper was supported by East Montpelier in the town of Worcester from some time in 1881 until No. 42, of the Acts of 1886, was passed. After the passage of this act, East Montpelier notified Worcester that it would not support him any longer, and it was held that Worcester could not recover for support thereafter furnished. In *Chittenden v. Barnard*, *supra*, the pauper had a legal settlement in Bar-

nard, and had resided there and been supported by Barnard. He went to Stockbridge to reside, and was there ordered to remove to Barnard. He then went to Chittenden and there came to want. Barnard was notified, and it assumed the burden of his support and provided for him in the town of Chittenden from April 1, 1884, to March 1, 1887, and then refused to further provide for him; and it was held that Chittenden could not recover for support thereafter furnished. See, also, *Vershire v. Hyde Park*, 64 Vt. 638, and *Londonderry v. Landgrove*, 66 Vt. 264, and the cases there cited.

The pro forma judgment affirmed.

Munson, J., prior to his election having advised in matters involved in the litigation, did not sit.

TAFT, J., concurs in the result upon the ground that the case shows the defendant took the pauper into Sandgate, and in contemplation of law the atmosphere of Rupert enveloped the pauper and he was residing in that town ever after, and for that reason was transient in Sandgate.

A. S. MARTYN v. FRANCIS CURTIS.

OCTOBER TERM, 1894.

Evidence. Presumption.

The plaintiff claimed that the alleged trespasses were committed on a ten acre parcel of which the original grant was in 1806, the deed of that date being introduced by the plaintiff. If the boundaries of this parcel were as claimed by the defendant, there would be no water upon it; if as claimed by the plaintiff, they would embrace a brook. The plaintiff offered to show "that the ten acre piece had long been used as a pasture, which would have no water in it if its south-east corner was where defendant claimed." This was excluded. *Held*, no error, for the offer was not equivalent to an offer to show that the parcel was so used in 1806.

Trespass *quare clausum*. Plea, not guilty. Trial by court at the June term, 1894, Ross, C. J., presiding. Upon the facts found the court gave judgment for the defendant. The plaintiff excepts.

John W. Gordon for the plaintiff.

The excluded evidence tended to render more probable the claim of the plaintiff, and should have been admitted. *Armstrong v. Noble*, 55 Vt. 428; *Randall v. Preston*, 52 Vt. 198; *Beckley v. Jarvis*, 55 Vt. 348; *Bartlett v. Wilson*, 60 Vt. 644; *Fire Ass'n, etc., v. National Bank*, 54 Vt. 657; *Richardson v. Royalton, etc., T. Co.*, 6 Vt. 496; *Moon v. Hawks*, 2 Aik. 390; *Downer v. Bowen*, 12 Vt. 452; *Kirkaldie v. Paige*, 17 Vt. 262; *Hard v. Brown*, 18 Vt. 87;

Walker v. Westfield, 39 Vt. 246; *Kent v. Lincoln*, 32 Vt. 591; *Henry v. Huntley*, 37 Vt. 316; *Earl v. Tupper*, 45 Vt. 275; *Kimball v. Locke*, 31 Vt. 683; *Buzzell v. Willard*, 44 Vt. 44; *Strong v. Slicer*, 35 Vt. 40; *Houghton v. Clough*, 30 Vt. 312; Steph. Dig. Ev., Art. 5 and note 1; *Jones v. Williams*, 2 M. & W. 326.

Subsequent acts are admissible to prove the original intention. *Hulett v. Hulett*, 18 Vt. 87; *Wright v. Williams*, 47 Vt. 222; *Brewin v. Farrell*, 39 Vt. 206.

R. M. Harvey for the defendant.

THOMPSON, J. The plaintiff claimed that the alleged trespass was committed on the ten acre lot owned by him. In his chain of title he put in evidence a deed from Samuel Fifield to David Adams, dated March 8, 1806, the original grant of the ten acre piece, in which the description is as follows :

“Also ten acres of land off the west end of the first division lot drawn to the original right of Ebenezer Brewster, beginning at the southwest corner of said lot and running forty rods east on the south line of said lot, thence turning and running about a north point until it strikes the west line of said lot far enough to contain ten acres.”

The parties were at variance by their respective evidence in regard to the true location of the west line of the Brewster lot, and especially of its southwest corner. If the southwest corner was located as claimed by the plaintiff, then his evidence tended to show the forty rods would extend across the brook. If located as the defendant's evidence tended to show, that distance would not extend across the brook. The location of this corner was a material question, for if located as claimed by the defendant, no trespass had been committed.

As evidence tending to show the location of this corner, the plaintiff offered to show “that the ten acre piece has

long been used as a pasture, which would have no water in it if its southwest corner was where defendant claimed." This offer was excluded, to which the plaintiff excepted.

It is now contended by the plaintiff that to show that this piece of land has *long* been used for a pasture would tend to show that it had always been used for that purpose; and if always used for that purpose, water is so essential to a pasture, it is probable that the ten acres described in that deed of 1806 included a part of the brook. The words "has long been used" are indefinite in respect to the time in the past from which, it is claimed, this land has been used as a pasture, but it is not claimed that the offer is to be construed as showing such use at the time the deed was executed in 1806. The existence of a thing permanent in its character, once established, is presumed to continue thereafter until the contrary is shown, but the *use* of land as a pasture is not of such a character. Again, "a presumption is not retrospective." Laws., Presump. Ev. 190, rule 37. Hence, no such inferences as those for which the plaintiff contends can legally be drawn from the evidence excluded. There was no error in excluding it.

Judgment affirmed.

MARY R. MASON v. BENT E. HORTON.

OCTOBER TERM, 1894.

Easements and servitudes. When they pass upon distribution among heirs. Non-user. Adverse user.

1. When real estate is so employed by the owner that the use of one parcel creates an easement in that parcel and a servitude upon another, that condition will inhere upon distribution among heirs, and the right will pass to the one taking the dominant parcel as by an implied grant.
2. An easement by grant is not lost through mere non-user. To work that result, the conduct of the owner of the dominant estate must be such as to plainly indicate an intention to abandon the easement, and this must have been acted upon by the owner of the servient estate so as to make its revival inequitable as against him.
3. The defendant's mill privilege took the water at a point above the plaintiff's dam, and discharged it into the river at a point below so that the plaintiff's privilege lost the benefit of it. *Held*, that the mere non-user of the defendant's privilege for more than fifteen years did not work a forfeiture of this right in it, nor create in the plaintiff's privilege a right to have the water flow in its natural channel.

Action on the case for the diversion of a watercourse. Plea, the general issue. Trial by jury at the September term, 1893, Rutland county, TYLER, J., presiding. The court directed a verdict for the plaintiff, submitting to the jury only the question of damages. The defendant excepts.

C. H. Joyce and H. A. Harman for the defendant.

The division of real estate among heirs is presumed to have been made in view of the open use of the property, and any easement or servitude which that use entailed would follow the different parcels. *Harwood v. Benton*, 32 Vt. 724; *Goodall v. Godfrey*, 53 Vt. 219.

Since by its use at the time of the division the defendant's privilege was discharging the spent water below the dam of the plaintiff's privilege, the owner took the right to so do. *Ritger v. Parker*, 8 Cush. 145; *Owen v. Field*, 102 Mass. 103.

And this would be not by adverse use or prescription, but as by an implied grant. *Goodall v. Godfrey*, 53 Vt. 219; *Smyles v. Hastings*, 22 N. Y. 217; *Lyon v. Fishmongers Co.*, L. R. 10 Ch. App. 679.

The right obtained by grant is not lost by mere non-user. *Mower v. Hutchinson*, 9 Vt. 242; *White v. Crawford*, 10 Mass. 183; *Arnold v. Stevens*, 24 Pick. 106; *Bannon v. Angier*, 2 Allen 128; *Owen v. Field*, 102 Mass. 190; *Barnes v. Lloyd*, 112 Mass. 224; *Day v. Walden*, 46 Mich. 575; *Horner v. Stillwell*, 35 N. J. L. 307; *Johnston v. Hyde*, 33 N. J. L. 632; *Richle v. Hewlings*, 38 N. J. Eq. 20; *Dill v. School Board*, 47 N. J. Eq. 421; *Kucchen v. Voltz*, 110 Ill. 271; *Roanoke Ins. Co. v. Kans. C. & S. E. R. Co.*, 17 S. W. 1000; *Ward v. Ward*, 7 Exch. 838; *Jewett v. Jewett*, 16 Barb. 157; *Butz v. Ihrie*, 1 Rawle 218; *Nitzell v. Paschall*, 3 Rawle 81.

J. C. Baker for the plaintiff.

It was the right of the plaintiff to have the stream flow by her land in its natural course. Gould, Waters, s. 204; Angell, Waterc., s. 133; *Johns v. Stevens*, 3 Vt. 308; *Davis v. Fuller*, 12 Vt. 178; *Adams v. Barney*, 25 Vt. 225.

The defendant has obtained no prescriptive right to dis-

charge the spent water below her dam, and thereby divert the stream from its natural course. *Weed v. Keenan*, 60 Vt. 74.

It is immaterial what the rights of the original owners in this property were. For more than twenty-six years the defendant made no use of the water in the stream, but allowed it to flow by the land of the plaintiff in its natural channel. She thereby acquired the right to such flow. *Angell, Waterc.*, ss. 496-499; *French v. Manufacturing Co.*, 23 Pick. 216.

START, J. The plaintiff and defendant own water privileges on opposite sides of a small stream in the town of Clarendon. These privileges were formerly owned and used by William Brown, from whom both parties derive their title. When both privileges were owned and used by William Brown the water was diverted by a dam, and used to supply mills on the defendant's side of the stream; and the water that was not thus diverted flowed in the channel until it reached land now owned by the plaintiff, and was there diverted by another dam, and used to supply mills on the plaintiff's side of the stream. William Brown died in 1830, and his estate was divided among his heirs. The plaintiff's privilege has not been used since sometime between 1870 and 1876. The defendant's privilege was not used from 1851 to 1877, when the defendant built mills and diverted the water to supply them the same as William Brown had been accustomed to do, and discharged the spent water at a point below the point where a dam was formerly maintained at the plaintiff's privilege. It appeared that during the time the defendant's privilege was not used all of the water flowed in the channel past the plaintiff's privilege; and she claims that it is her right to have it flow as it did during this time.

The plaintiff's evidence tended to show that when the de-

fendant's privilege was formerly used the spent water was discharged above her dam, and that she and her grantors had the benefit of all the water. The defendant's evidence tended to show that the spent water was discharged below the dam during all the time his privilege was used by William Brown, his heirs and their grantees, down to 1851, and that neither the plaintiff nor her grantors had any use of the water that was diverted to supply mills on his side of the stream.

The plaintiff requested the court to direct the jury to return a verdict for her. The court complied with this request, and refused to submit any questions to the jury except the question of damages. In this there was error.

The defendant's evidence tended to show that during the time William Brown owned and occupied both privileges, the spent water from the mills on the defendant's side of the stream was discharged below the dam which fed the mills on the plaintiff's side of the stream. If the water was thus discharged during William Brown's ownership of both privileges, when the estate was severed and the different privileges passed to the respective heirs in severalty, the right to thus discharge the water continued, as a matter of legal right, in the respective heirs and their grantees, as an implied grant, the same as though such right had been set forth in the instrument by which the estate was severed, and the privileges set to the respective heirs. *Harwood v. Benton*, 32 Vt. 724; *Goodall v. Godfrey*, 53 Vt. 219.

The defendant having succeeded to the title of the heirs to whom his privilege was set out, he has a right to discharge water at the same points where it was discharged during the time William Brown owned and used both privileges, unless that right is lost by reason of an adverse use by the plaintiff or his grantors, or by non-use by the defendant and his grantors, for fifteen years. We think the court could not hold, as a matter of law, that the use of the water

by the plaintiff and her grantors was adverse, or that they had exercised any adverse rights.

When the mills on the defendant's side of the stream went to decay, the defendant and his grantors had no use for the water until new mills were erected in 1877; and for this reason, from 1851 to 1877, they did not draw water from the stream. Consequently, all the water flowed through the channel into the pond on the plaintiff's side of the stream, and she and her grantors used for a time so much of it as was necessary to propel their machinery; but in so doing they were not in the exercise of an adverse right. They used the water because it flowed naturally along the channel and came into their pond. The plaintiff and her grantors have not deprived the defendant or his grantors of the use of the water. They have done nothing to indicate that their use of the water was in any way adverse to the rights of the defendant and his grantors. They have used no more water than they did while the defendant's privilege was being used, and this quantity gradually diminished until 1876, when the plaintiff ceased to use it; and since that time her privilege has not been used. The plaintiff and her grantors have not erected buildings, or in any way improved their privilege, because of the non-use of the water by the defendant and his grantors. They have done nothing that they could not have lawfully done if the defendant's privilege had been used from 1851 to 1877, the same as it was theretofore used by William Brown. They have done nothing that can be said to be the exercise of an adverse right. The mere use of the water by the plaintiff and her grantors, under the circumstances disclosed by the evidence, was not conclusive evidence of an adverse enjoyment of such use. *Arnold v. Stevens*, 24 Pick. 106.

The court could not hold, as a matter of law, that the right to draw and discharge water at the defendant's privilege was lost by non-use. The right, as we have seen,

was created by grant, and could not be lost by mere non-use. Mere non-use, for any length of time, of an easement created by grant, will not destroy or extinguish it. In order to extinguish it by non-use there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the non-use must be the result of it, and must continue for fifteen years; or, to produce this effect, the non-use must originate in, or be accompanied by, some unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted. There was no evidence of such unequivocal acts on the part of the defendant or his grantors, and the court could not rightfully hold that the easement had been lost by abandonment.

The view we have taken of the evidence and the law governing this case leads us to the conclusion that the question of where William Brown discharged the spent water from the defendant's privilege was material, and should have been submitted to the jury. No question seems to have been made but that the defendant took water from the stream in the same manner that William Brown was accustomed to take it; and if the jury found that he discharged the spent water in the same place where William Brown discharged it, then the defendant was not guilty of diverting the water unless the defendant or his grantors have released or conveyed the right, or the right has been lost in some of the ways indicated in this opinion.

Judgment reversed and cause remanded.

WESTERN UNION TEL. CO. v. G. B. BULLARD.

JANUARY TERM, 1895.

*Erection of telegraph line in street. Consent of abutter acted upon cannot be revoked. Injunction.
Decree for damages. Reversioners.*

1. An abutter, who has consented to the erection of a line of telegraph poles along the street in front of his premises, can not revoke that license after the poles have been set, but before the wires have been strung.
2. By consenting to the erection of the line, the land owner waived any claim he might have for damages, and it is therefore immaterial whether the construction of a telegraph line along a public highway imposes an additional burden, and if so, whether one who does not own the fee of the street can claim compensation.
3. Persons having a reversionary interest in the premises are not necessary parties, for consent of the defendant did not give an easement, but a mere license.
4. Equity will enjoin an abutter from interfering with the maintenance of a telegraph line so constructed by his consent, and damages for injuries done the line may be decreed in the same suit.

Bill in equity. Heard at the June term, 1894, Caledonia county, upon the report of a master and exceptions of the defendant thereto. TYLER, Chancellor, *pro forma* decreed that a perpetual injunction be granted, and that the orator recover forty dollars damages and its costs. The defendant appeals.

The orator prayed that the defendant be perpetually en-

joined from interfering with its telegraph line opposite his premises, and for general relief. The bill alleged that the defendant had partially destroyed and proposed to entirely destroy the orator's line unless restrained, and the master found that the damages occasioned by what the defendant had done before the granting of the temporary injunction were forty dollars. The facts fully appear in the opinion.

Harry Blodgett, W. P. Stafford, and Bates & May for the orator.

The defendant, having given the orator license to erect its poles, could not revoke that license after it had been acted upon by the orator. *Ricker v. Kelley*, 1 Greenl. 117; *Rerick v. Kern*, 14 Serg. & Rawle 267; *Adams v. Patrick*, 30 Vt. 516; *Hawthorne v. Seigel*, 88 Cal. 159; *Vannest v. Fleming*, 79 Iowa 638.

It was not necessary to join the defendant's daughters, who owned the reversion, for the defendant's license would not bind them. *Jackson v. Johnson*, 5 Cowen 74, 15 Am. Dec. 433; *Washburn, Eas.*, 114; *Barker v. Richardson*, 4 Barn. & Ald. 579; *Higgins v. Farnsworth*, 48 Vt. 512.

The erection of telegraph poles along a public highway does not impose an additional burden. *Prince v. Drew*, 136 Mass. 75; *Hewitt v. Tel. Co.*, 4 McKey 424; *Building Ass'n v. Bell*, 88 Mo. 258.

Dunnett & Nelson for the defendant.

The defendant could revoke his license so long as it was executory. *Ruggles v. Lesure*, 24 Pick. 187.

His daughters, who owned the abutting premises, were necessary parties. *McConnell v. McConnell*, 11 Vt. 290; *Day v. Cummings*, 19 Vt. 496; *Mallow v. Hinde*, 12 Wheat 194.

The erection of a telegraph line along a highway imposes an additional burden, and the legislature cannot authorize it without compensation. *Dusenburg v. Mut. Tel. Co.*, 11 Abbott N. C. 440; *Metropolitan Telep. & Tel. Co. v. Colwell Lead Co.*, 67 How. Pr. 365, 50 N. Y. Sup. Ct. 488; *Broome v. N. Y. and N. J. T. Co.*, 42 N. J. Eq. 141; *Halsey v. Rapid Transit Street Rd. Co.*, 47 N. J. Eq. 380; *Willis v. Erie Telep. & Tel. Co.*, 37 Minn. 347; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Smith v. Central District Printing and Tel. Co.*, 2 Olin Cir. Ct. 259; *W. U. Tel. Co. v. Williams*, 86 Va. 696; *Chesapeake and Potomac Telep. Co. v. McKenzie*, 74 Md. 21; *Stowers v. Postal Tel. Cable Co.*, 9 S. Rep. 356; *Postal Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 173.

TYLER, J. The report of the special master has practically settled the matters in controversy in this suit.

No. 32, Acts of 1888, which is an amendment of s. 3633, R. L., gives telegraph and telephone companies the right to construct and maintain their lines upon any highways in this state, though not to interfere with the public use of such highways.

It being found desirable to erect this line along the street of a village and in front of and near the defendant's residence, substantially where the old line stood, it was his right under s. 3635, R. L., to apply to the village trustees, who were empowered to determine through what streets and in what manner the line should pass. Though the defendant did not apply to these officers, "the location and the manner of replacing and repairing the line were adopted upon conference between the orator and the trustees, * * * and the trustees approved of the work as it progressed."

The defendant's premises constituted a fine residential property fronting on this street, and he desired to cultivate his grounds, which commanded an extended and picturesque

view, and make the place a model of beauty. His counsel contend that as it was found that the line caused some damage to the property, the orator should have proceeded under s. 3637, R. L., which provides that the selectmen shall in such cases appraise the damage before the line is erected. This should have been done if the defendant objected to the erection of the line.

Upon this subject the master finds "that the poles and wires do interfere somewhat with the defendant's shade trees, but that results from the fact that the trees overlap a public street," "that the poles do somewhat mar the beauty," that "the outlook is interrupted," and "that there was some trimming of the branches of the trees that overhung the street." He also finds that the manner of construction of the line was reasonable and proper, and that the trimming was of the smaller twigs and was carefully and properly done.

It was held in *Rugg v. Tel. Co.*, 66 Vt. 208, that section 3637 was to be construed, in the light of the preceding sections, to mean that the selectmen were not to assess damages in the cases named in the section except when objections were made.

The findings are that the old posts had become dilapidated, unsightly and unsafe, that the trustees had made complaint thereof to the company, which undertook to replace the old line with a new one on the southern side of Eastern avenue, and that the location was agreed upon. Before anything was done the trustees informed the defendant of the proposed plan with its material details, to which he gave his consent. The agent of the company, relying thereon, proceeded to prosecute the work, erected poles on the avenue as far as the defendant's estate, and one pole opposite thereto. Other poles were left upon the ground and holes were dug for them, when the defendant objected to those selected to stand on each side of his driveway, and was allowed to

select others, which he did, and said they were satisfactory to him. The orator's agents then set these two poles in the line, and the next morning the defendant directed his man to cut down one of them, warned the agents not to proceed further, threatened violence if they should do so, and gave notice that he should remove the poles as fast as they were erected. Later in the same day upon a conference with the trustees he withdrew his objection and said that he would not object further, whereupon the line of poles opposite his premises was completed, and the cross arms were nailed on and prepared for the wires. This was on Saturday. Sunday night he proposed to one of the trustees to run the line in the rear of his buildings, and notified the trustee in behalf of himself and daughters "that he would not have any lines or telegraph poles and wires in front of his premises." This was communicated to the company's agents who had the work in charge. Early Monday morning the company's agents strung two wires upon the arms, and later in the day, by the defendant's directions, one arm was sawed off and one pole was cut down, which acts were the cause of moving for the injunction. So it appears that nothing was done about erecting the line in front of the defendant's premises without his consent except stringing the wires Monday morning.

It is found that the orator was a corporation which, for many years prior to 1880 and ever since, has operated a telegraph line along the Passumpsic division of the Boston & Maine railroad from Newport to St. Johnsbury, and thence connecting with the principal cities of the country. The company's office since 1880 had been in Union block on Main street, about one hundred rods west of the railway station, and from it poles and wires ran through Eastern avenue to the station. From this office the train despatching messages were sent, and it was also for the accommodation of the general public.

The defendant had given the orator's agents permission to do all that had been done down to the stringing of the wires. They had acted on his consent and incurred expense. In view of the facts stated his consent was irrevokable at that stage of the work, certainly without an offer to place the orator in *statu quo*. To have prevented the completion of the line would have operated as a fraud upon the orator. The doctrine of equitable estoppel should be applied. *Clark v. Glidden*, 60 Vt. 702 and cases cited; *Ricker v. Kelley*, 1 Green. 117 s. c. 10 Am. Dec. 38; *Rerick v. Kern*, 14 Ser. & Rawle, s. c. 16 Am. Dec. 497.

In *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, under a statute which required that the authorities of incorporated cities and towns should designate the streets in which telegraph poles and wires should be placed, it was held that after such designation by the defendant's common council, and the erection in the designated streets of from thirty-five to forty posts at an expense of about ten dollars each and an expenditure of some other moneys, the plaintiff's right was irrevokable; that after the expenditure of money in reliance upon such designation, the plaintiff obtained a vested right, of which it could not be deprived by a subsequent revocation.

There is an elaborate discussion of the doctrine of parol license and revocation thereof in the notes to *Rerick v. Kern*, in 2 Am. L. C. 546, 577, where the editors say that the apparent discrepancy in the numerous cases considered is, after all, chiefly in "the form of the remedy and the forum where it should be sought, and hardly extends to the existence of the right or the interpretation of the principles on which it rests." *Foster v. Browning*, 4 R. I. 47. Everyone must assent to the position taken by Chief Justice Gibson in *Rerick v. Kern*, that equity will decree a specific performance when compensation in damages would be inadequate to the purposes of justice, and that the partial execu-

tion of a parol agreement may supply the want of a writing, and withdraw the case from the operation of the statute of frauds. Nor would it be easy to take any valid exception to the dictum of the same judge in *Swartz v. Swartz*, 4 Barr, 353, 358, that when the revocation of a license would operate as a fraud, a chancellor will turn the licensor into a trustee, *ex malificio*, for the licensee, on principles analagous to those which apply when the owner of land stands by and allows another person to make improvements on it, under the belief that he will be allowed to reap the fruits of his labor and expenditure.

In *Williams v. Morris*, 95 U. S. 457, it is said :

“Where one of two contracting parties has been induced or allowed to alter his position on the faith of such contract, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, courts of equity hold that the clear proof of the contract and of the acts of part performance will take the case out of the operation of the statute, if the acts of part performance were clearly such as to show that they are properly referable to the parol agreement.” Chit. on Cont. 66, 278 ; 2 Sto. Eq. Jur. s. 761.

The defendant further contends that the legislature cannot by law subject a public street to this use without compensation to the owner of the abutting land for damages, and that it was in this view that s. 3637 was enacted.

It has been a controverted question whether the use of a street or highway for a telegraph or telephone line imposes a new burden upon the land for which the owner would be entitled to compensation. It has been contended on one side that the easement of the highway is the right of use of the public generally for the purpose of intercommunication, not only for travel, but also for the transmission of intelligence ; that the use of the telegraph, being for a public purpose, is not inconsistent with the use for which the highway was dedicated. On the other hand it has been argued that streets and highways were designed for public travel and

transportation, that they were dedicated or condemned for those purposes, and that their use for the transmission of intelligence is an entirely different use, and could not have been contemplated when the land was taken. Keasey on Electric Wires, 71.

The defendant's counsel have referred us to several authorities in support of the latter claim, but in nearly every case the title of the aggrieved owner extended to the center of the street, so that the structure was on his land. In this case it is found that the Bullard property was carved out from land of Joseph Fairbanks, who owned where the avenue now is, and that the Bullard title extends north only to the south line of the avenue, which was laid before the defendant acquired his title, and that the telegraph line is wholly off the defendant's land and within the limits of the avenue.

Some authorities hold, and the defendant contends, that the rights of the abutter, as between him and the public, are substantially the same whether the fee is in him subject to the public use, or in the municipality in trust for street uses proper. Dill. on Mu. Cor. 698. Other authorities make the determinative question whether the fee is in the land owner or in the public, and allow compensation in the former case and deny it in the latter.

It is unnecessary to decide these questions now, for the reason that whatever rights the defendant had he gave up by his consent. In the circumstances there was no occasion for the selectmen to assess the damages.

It appears that the defendant occupies this land as tenant by the courtesy, and claims that his consent could not bind his children, who hold the reversionary interest, and who are not made parties to the suit. The right conferred was not an easement in the land; it was a mere license to do a certain act along the street, and not upon the land of the reversioners.

The general prayer for relief in a bill in chancery is sufficient to obtain all relief consistent with the general frame of the bill. *Danforth v. Smith*, 23 Vt. 247. Under this prayer, and to prevent a multiplicity of suits upon a bill to restrain a trespass, damages may be awarded for injury from the trespass prior to the injunction. 1 Daniel's Ch. 377, notes. It is said in *Whipple and Wife v. Fair Haven*, 63 Vt. 221, * * * "it is a familiar rule that when the court of chancery has jurisdiction of a case for one purpose it will retain it for all other purposes, and dispose of the whole matter. And this is a salutary rule, for it prevents litigation, and to end that is for the public good."

Decree affirmed and cause remanded.

ALBERT F. LANE v. GEORGE A. SCAGLE.

MAY TERM, 1894.

Negligence. Use of water pipes.

It is not negligence upon the part of the occupant of a room in which is a set-bowl to leave the faucet into the bowl open, the bowl being provided with a waste pipe which was of sufficient size to, and did in fact at the time, carry the water off from the premises, and the occupant being under no obligation to repair the plumbing beyond his premises, and having no reason to believe that it was defective.

Action on the case. Plea, the general issue. Trial by jury at the September term, 1893, Franklin county, Ross, C. J., presiding. Verdict and judgment for the plaintiff.

At the close of the testimony the defendant moved the court to direct a verdict for that there was no evidence tending to show negligence. This the court declined to do, and the defendant excepted.

Farrington & Post for the defendant.

The evidence did not tend to show negligence. The defendant had come short in no duty which he owed the plaintiff. *Kennedy v. Morgan*, 57 Vt. 46.

Negligence will not be presumed. *Lindsay v. C. & P. Rd. Co.*, 27 Vt. 643; *Cleveland v. Grand Trunk Rd. Co.*, 42 Vt. 449; *Sher. & Red., Neg.*, s. 12.

H. C. Adams and Wilson & Hall for the plaintiff.

START, J. This is an action on the case, and the plaintiff alleges that the defendant so negligently used a certain faucet connected with the St. Albans water works as to damage his goods. At the time of the injury complained of, the plaintiff occupied the first floor and the defendant the second floor of a building owned by O. A. Burton. The defendant had in his room a hand wash basin, connected with the St. Albans water works. It had an outlet at the bottom and holes through the sides near the top to carry away the waste water. The outlet, which was open at the time the plaintiff claims his goods were damaged, was sufficiently large to carry off all the water that would run into the basin. The plaintiff, on going to his store on the morning of November 1, 1892, found water running through the ceiling from the floor above. At this time it was found that water was running from the faucet into the basin in the defendant's room. The basin was not running over, and there was no water on the floor.

This evidence did not tend to show that the defendant was guilty of negligence, and the court should have ordered a verdict for the defendant. The outlet of the basin was sufficient to carry off all the water that would run from the faucet, and it does not appear that it did not so carry it off at the time of the injury complained of. It does not appear that there was any defect in the basin or pipes in the defendant's room. Negligence cannot be inferred from the fact that the faucet was open. In leaving the faucet open and allowing the water to run, the defendant was using it for the purpose for which it was intended. Such arrangements are for use in supplying water, and it was error to leave the jury at liberty to infer negligence from the fact that the defendant allowed water to run into a basin that had an outlet of sufficient capacity to carry it off. There is nothing in the evidence that tends to show that the construction and arrangement of the plumbing on the defendant's

floor was ~~not~~ all that was required to guard against damage from water to the occupant below. If any inference can be drawn from the evidence, it is that the water escaped from the pipe after it passed through the floor occupied by the defendant. If such inference can be legitimately drawn from the facts, the plaintiff was not entitled to go to the jury; for it does not appear that the defendant knew, or had reason to believe, that there was any defect in the pipe below the floor occupied by him, nor does it appear that the defendant was under any duty to inspect or keep in repair the pipe below the floor occupied by him.

We find no error in the rulings of the court in respect to the admission of evidence, nor in the charge of the court as given, nor in the refusal to charge as requested upon the subject of damages.

Judgment reversed and cause remanded.

Thompson, J., being engaged in county court, did not sit.

F. W. WATKINS v. WALLACE S. RIST.

OCTOBER TERM, 1894.

Fences. Whose duty to repair.

The plaintiff's fence was broken down by the unruly cattle of the defendant, which then and on subsequent occasions entered through the break, and damaged the plaintiff's fields. *Held*, that the defendant was liable for damage to the fence and for damages to the fields until the plaintiff had reasonable opportunity to repair the fence, but not afterwards.

Trespass *quare clausum*. Plea, the general issue. Trial by jury at the May term, 1894, Windsor county, THOMPSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

W. W. Stickney and *J. G. Sargent* for the defendant.

It was the duty of the plaintiff to repair this fence, and he cannot recover for damages resulting from his neglect to do so. *Kenan v. Cavanaugh*, 44 Vt. 268; *Scott v. Grover*, 56 Vt. 499; *Eddy v. Kinney*, 60 Vt. 554.

Gilbert A. Davis for the plaintiff.

MUNSON, J. The plaintiff's lawful fence was broken down by the defendant's unruly cow; and the defendant's cattle came upon the plaintiff's land through the break at the time it was made, and continued to do so for some time thereafter. The court instructed the jury that the defendant

was liable for every entry made by his cattle upon the plaintiff's land through this opening. This was error. The plaintiff's recovery should have been limited to such entries as occurred before he had had what was, in the circumstances, a reasonable time to repair the fence. The defendant was liable in damages for the injury done to the fence. The duty of repairing it rested upon the plaintiff.

Judgment reversed and cause remanded.

L. B. BALDWIN, ADMR.,

v.

TOWN OF WORCESTER.

OCTOBER TERM, 1894.

Pauper. Contract to support.

The intestate, while residing in defendant town, contracted with it to support one of its paupers for a given time. Subsequently, and during the life of the contract, he removed the pauper into another town, and continued to support him there against the protest of the defendant. *Held*, that there could be no recovery for support furnished after the time limited by the contract.

General assumpsit for the balance claimed to be due for the support of a pauper. Trial by jury at the September term, 1894, Chittenden county, THOMPSON, J., presiding.

The plaintiff sought to recover upon an express contract

up to June 1, 1889, and upon an implied contract from June 1, 1889, until December 1, 1890. The court directed a verdict for the plaintiff for the amount due on the express contract, and held that there was no evidence tending to establish an implied contract subsequent to that date. To this latter holding the plaintiff excepted. The opinion states the case.

D. J. Foster for the plaintiff.

A promise to pay for the support of a pauper may be implied. *Tufts v. Town of Chester*, 62 Vt. 358; *Ex parte Ford*, 16 Q. B. D. 307; *Bixby v. Moore*, 51 N. H. 402; *Paddock v. Kittredge*, 31 Vt. 378; *Worcester v. Ballard*, 38 Vt. 60; *Wolcott v. Wolcott*, 19 Vt. 37; *Durfey v. Worcester*, 63 Vt. 418.

The town should have removed the pauper. *Durfey v. Worcester*, 63 Vt. 418; *Leicester v. Brandon*, 65 Vt. 544.

S. C. Shurtleff for the defendant.

There is no liability in the absence of an express promise. *Castleton v. Miner*, 8 Vt. 209; *Ives v. Wallingford*, 3 Vt. 224; *Houghton v. Danville*, 10 Vt. 537.

The plaintiff was in no way misled by the neglect of the defendant to remove the pauper. *Aldrich v. Londonderry*, 5 Vt. 441.

START, J. While the plaintiff's intestate resided in the defendant town he made a contract with the defendant's overseer of the poor, by which he was to support Daniel Durfey, an alleged pauper, for five dollars per week until a suit then pending between the defendant town and East Montpelier should be determined. While this contract was in force the plaintiff's intestate moved to South Burlington, and against the objection of the defendant's overseer of the

poor, took the pauper with him. The contract terminated June 1, 1889. The plaintiff's intestate continued to support the pauper until July 30, 1890. The plaintiff seeks to recover for the support furnished after the termination of the contract.

Under these circumstances a promise to pay for the support furnished cannot be implied. The plaintiff's intestate voluntarily, and against the objection of the defendant, removed the pauper from the defendant town to South Burlington, and there continued to support him after the express contract had terminated by its own limitation without offering to return him to the defendant, and without any agreement or understanding in respect to his support. The plaintiff's intestate was bound to know when his contract terminated; and if he desired to be relieved from the burden of the pauper's support after the contract was ended, he should have returned him to the defendant town, or taken measures to charge the defendant or some other town with his support. Under the statute relating to the support of paupers, he could not assume that the defendant would pay for the pauper's support until it removed him or made some provision for his support. He was not misled, deceived, or in anyway induced by any act of the defendant to do what he did.

He made the contract for the support of the pauper while he and the pauper resided in the defendant town; and he removed the pauper to South Burlington and there supported him, knowing that the defendant was insisting that it was not liable for support furnished after the pauper was so removed. Under these circumstances the defendant was under no duty to take the pauper away. The defendant had not been instrumental in his removal to South Burlington. The plaintiff's intestate removed him for his own advantage and convenience against the protest of the defendant; and it was not its duty to go to South Burlington, or to follow the plaintiff's intestate wherever he saw fit to go and relieve

him from the support of the pauper. No such duty was cast upon it by the terms of the contract, and no such duty can be inferred from the nature of the contract or the situation of the parties and pauper at the time the contract was terminated. This holding is not inconsistent with the holding of the court in *Durfey v. Worcester*, 63 Vt. 418, in respect to the defendant's liability upon the express contract. The question of implied contract was not involved in that case. The action was upon the express contract. While the contract was in force and the pauper in the defendant town, the defendant undertook to terminate the contract by giving notice that it would not be further holden for his support. This it could not do without taking him away and providing other support. At the time the alleged cause of action accrued in this case, there was no contract to terminate; it had terminated by its own limitation, and the situation of the pauper was such that no action on the part of the defendant was necessary. When the contract terminated by its own limitation, the pauper had been so far removed from the defendant town by the plaintiff's intestate that the defendant was under no legal duty to the plaintiff's intestate, and no recovery can be had for support thereafter furnished.

Judgment affirmed.

ROLLIN AMSDEN v. JOHN P. ATWOOD.

OCTOBER TERM, 1894.

Tenant holding over. When tenancy becomes one from year to year.

1. If a landlord suffers his tenant, who has been holding under a written lease providing for the payment of an annual rent, to remain in possession and pay rent for one full year after the expiration of the term and to enter upon a second year, the tenancy thereby becomes one from year to year, and the tenant may complete the second year.
2. The fact that the tenant, after receiving a notice to quit after entering upon the second year, decides to vacate the premises and removes a part of his machinery, does make due rent which would not be due by the terms of the lease, there being no surrender of the premises by the defendant.
3. *Held*, that the agreement between the parties extended all the covenants of the original lease not specifically changed.

General assumpsit. Plea, the general issue and offset. Trial by jury at the May term, 1894, Windsor county, THOMPSON, J., presiding. The court directed a verdict for the plaintiff. The defendant excepts.

The plaintiff sought to recover for certain articles furnished by him to the defendant about which no question was made. He also claimed to recover for rent of power and use of mill under the contract of lease set forth in the opinion of the court from October 1, 1892, to the date of the writ in this suit, which was December 27, 1892. The court directed a verdict for the plaintiff in the sum of two hundred fifty-

seven dollars and ninety-four cents and gave judgment thereon, to which the defendant excepted. In this amount the court included rent of power for the month of November and two-thirds of the month of December, 1892, and use of the mill from November 1 to December 19, 1892.

After December 19 the plaintiff refused to saw the logs of the defendant, and on December 26 gave the notice mentioned in the opinion of the court. The defendant did no work in the premises after December 19.

The defendant offered to show under his plea in offset that he had contracted for large quantities of logs to be manufactured under this lease, and that by the action of the plaintiff he was deprived of the profit he would have thereby made. The court held that upon the evidence the defendant was not entitled to go to the jury upon his plea in offset, to which defendant excepted.

J. J. Wilson and *J. C. Enright* for the defendant.

The new agreement between the parties extended all the terms of the old lease. *Monfort v. Stevens*, 68 Mich. 61; *Gray v. Clark*, 11 Vt. 583; *Kyle v. Billenger*, 79 Ala. 516; *People v. Lee*, 7 Cent. Rep. 35; *Mathews v. Phelps*, 61 Mich. 327.

By the acts of the parties the tenancy of the defendant had become one from year to year, which the plaintiff could not terminate at his pleasure. *Switzer et al. v. Pinaning Manfg. Co.*, 59 Mich. 488; *Evans v. Sander*, 8 Porter 497; *Adams v. Hill et al.*, 16 Me. 215; *Cocheo Bank v. Berry*, 52 Me. 293; *Clark, Apt., v. Howland et al.*, 85 N. Y. 204; *Miller v. Ridgley*, 19 Ill. appt. 306; *Taylor, Land & Ten.*, s. 58; *Putehell v. Ritter*, 16 Ill. 96; *McKenney v. Peck*, 28 Ill. 174; *Wood, Land. & Ten.*, s. 13, pp. 19, 20; *Schlyer v. Smith*, 51 N. Y. 309; *Parker, Admr., v. Hollis et al.*, 50 Ala. 411; *Coombero v. Heffnor*, 86 Ind. 108.

Gilbert A. Davis and *W. B. C. Stickney* for the plaintiff.

The plaintiff having elected to vacate after the notice of December 26, he should be compelled to pay rent for the time that he actually occupied the premises. *Patchin v. Dickerman*, 31 Vt. 660; 1 Washb., R. P., 394, s. 2; *Chamberlin v. Donahue*, 45 Vt. 55.

Notice that if a tenant continues in possession it must be at an increased rent amounts to a notice to vacate. *Amsden v. Blaisdell*, 60 Vt. 390; *Whitney v. Gordon*, 1 Cush. 266, 269; *May v. Rice*, 108 Mass. 150; (11 Am. Rep. 320); *Farson v. Goodale*, 8 Allen 202.

A tenant holding over is not entitled to a notice to quit. *Rich v. Bolton*, 46 Vt. 84; Wood, Land. & Ten., ss. 18, 19; *Logan v. Herran*, 8 S. & R. 459; *Anderson v. McLeod*, 12 Johns. 182; *Stedman v. Gassett*, 18 Vt. 346; *Osgood v. Dewey*, 13 Johns. 240; *Abul v. Radcliff*, 13 Johns. 297.

The act of the defendant in electing to vacate the premises was notice to the plaintiff that he would not continue the tenancy, and the plaintiff might bring his action at once. *Hochester v. De la Tour*, 20 Eng. L. & Eq. R. 175; *Burtis v. Thompson*, 42 N. Y. 246; *Burge v. Koop*, 48 N. Y. 225; *Freer v. Dunton*, 61 N. Y. 492; *Fox v. Kelton*, 19 Ill. 519; *James v. Mitchell & Adams*, 16 W. Va. 245; *Dangley v. Ober*, 11 Fed. Rep. 373; *Holloway v. Griffith*, 32 Iowa 409; *McCormick v. Bascal*, 46 Iowa 235.

The damages under the plea in offset were too remote. *Thompson v. Shattuck*, 2 Met. 615; *Griffin v. Colver*, 16 N. Y. 489; *Wehle v. Butler*, 61 N. Y. 245; *Olmsted v. Burke*, 25 Ill. 86; *Shaw v. Wallace*, 1 Dutch. 453; *Middlekouff v. Smuth*, 1 Md. 343; *McKinnon v. McEwan*, 48 Mich. 106; *Willingham v. Hoovan*, 74 Ga. 233; *Allis v. McLean*, 4 Mich. 428; *Krom v. Levy*, 48 N. Y. 679;

Davis v. C. H. & D. Rd. Co., 1 Desney, 23; *Pennypacker v. Jones*, 106 Penn. 237.

TYLER, J. It appeared on the trial that the plaintiff was the owner of a water power, with a saw-mill and machinery situated thereon, in Windsor, and that on August 19, 1885, by an indenture, he leased a portion of the same to one Loring Atwood for the term of five years from October 1, 1885, at an annual rent of four hundred dollars, in quarterly payments of one hundred dollars, on the first of January, April, July and October. It was stipulated in the lease that the plaintiff should build a dry-house on the premises, and that the lessee should pay him as rent therefor eight per cent interest on its cost. It was further stipulated that the plaintiff should saw the lessee's logs for his business—the manufacture of chair stock—at a price thereafter to be agreed upon and indorsed on the lease. It was afterwards agreed that the price should be sixty cents an hour, but it was not indorsed.

The lessee entered into the use and occupation of the premises and continued therein until April 1, 1890, when with his consent a new contract was executed by the plaintiff and the defendant as follows:

“That whereas said John Atwood has taken the place of Loring Atwood in a contract or indenture dated the nineteenth day of August, 1885, executed by and between Loring Atwood and the said Amsden, and whereas certain modifications and extensions of said contract or indenture have been mutually agreed upon by and between said Amsden and said John Atwood which it is deemed desirable to put in writing; therefore be it known that the said Amsden, for a valuable consideration, doth hereby extend the lease set forth in said contract or indenture of August 19 for the term of one year from the first day of November, 1890, with a further extension of a term not exceeding five years from the first day of November, A. D. 1891, at the option of said John Atwood, provided he shall give to said Amsden notice in writing at least three months prior to November 1, 1891,

of the number of years for which he shall elect to hold and enjoy such extended term; and the said John Atwood, in consideration of the foregoing, doth hereby covenant and agree to and with the said Rollin Amsden that he will pay in equal quarterly instalments of one hundred nine dollars and forty-four cents on the first days of January, April, July and October, for such extended terms as the rent thereof, except so far as said rent may be reduced under the provisions of said indenture of August 19, 1885, and that he will in all respects fulfil all the contracts and agreements of the said Loring Atwood therein contained. It is further mutually agreed and covenanted that if the said John Atwood does not have logs so as to run his chair works from the first day of April to the first day of November, A. D. 1890, then the rent is to be reduced one-half for such time only between said dates as said shortage of stock may exist."

It is clear that the original lease with all its covenants was extended by this contract, excepting so far as the covenants were thereby changed. The only changes made were a slight reduction in the quarterly rent, and a further agreement that the rent should be reduced one-half for such time between April 1 and November 1, 1890, as the defendant was short of logs for his chair works.

The new contract definitely extended the lease to November 1, 1891, with an option in the defendant to have it extended a further term, not exceeding five years from that date, by giving the plaintiff three months previous notice thereof. As the defendant failed to exercise his option the lease terminated by its own limitation on that date, and the defendant remained in possession without right.

The relation of landlord and tenant can exist only by virtue of a contract, express or implied. It may be created by implication of law as well as by express contract. Here the express contract had terminated, and the question is whether the defendant remained as a tenant by implication of law, and if so, what was the nature of his tenancy?

It is clear that after the extended lease terminated the

plaintiff might have evicted the defendant. He allowed him to remain without objection until November, 1, 1892, and thence until December 26 of that year, when he gave him a written notice that he regarded him as a tenant by sufferance; that the rent would be increased to six hundred dollars after January 1, 1893; that the charge for sawing logs would be increased, and that as a condition of the defendant's continuing as his tenant he should not employ men who were personally offensive to the plaintiff.

In *Blumenburg v. Myers*, 32 Cal. 93, it was decided that a tenancy by implication arose, subject to the covenants and conditions of the original lease, where the tenant held over and the landlord received rent after the expiration of the term. This was on the ground that the receipt of the rent was an acknowledgment of a subsisting tenancy. Numerous cases are cited in the valuable notes to this case in 91 Am. Dec. 560, to the effect that a tenant whose term has expired, and who, instead of quitting the premises as he ought to do, remains in possession, holding over, is a wrong doer, and the landlord may treat him either as a trespasser or as a tenant for another year upon the same terms, at his option; *Den v. Adams*, 12 N. J. L. 99; *Rowan v. Lytle*, 11 Wend. 619; *Adams v. Duker*, 11 N. J. L. 84; that this is so, though the tenant has no intention of holding over for a year or of paying the same rent; *Hemphill v. Flinn*, 2 Pa. St. 144; *Bacon v. Brown*, 9 Conn. 362; even where before the expiration of his term he notifies the landlord that he does not intend to keep the premises another year, but nevertheless remains in possession; that his remaining fixes him as a tenant for another year if the landlord chooses to treat him as such.

Wood, on Land and Ten., s. 484, says:

"By holding over after the expiration of the term, the lessee becomes a tenant at sufferance. He does not thereby necessarily become a tenant from year to year, though such

a holding, accompanied with payment of rent or other recognition by the lessor of a tenancy, may ripen into an estate of that description; the tenant, in the absence of evidence to the contrary, being bound by the terms of the expired lease, so far as they are applicable to such an estate, without any new bargain to that effect between him and the lessor." * * *

In s. 13 of the same work the author says:

"By the common law, if a tenant who has occupied and paid rent annually holds into a new year, it is evidence of a new demise for a year, or rather from year to year, according to the circumstances, or of a tenancy at will, if the circumstances are such as to rebut a renewal of a former tenancy," and cites *Jackson v. Salmon*, 4 Wend. 327; *Bradley v. Covel*, 4 Cow. 349, and *Digley v. Atkinson*, 4 Camp. 178. In that section it is said that the landlord may treat the tenant holding over as a trespasser, or as a tenant holding over on the terms of the original lease. In such case the lease is not the *contract* under which the tenant holds, but is *evidence* of the contract. The tenant holds upon the terms of the expired lease unless notified of new terms before the lease expired.

In 4 Kent's Com. 112, it is laid down that:

"If the tenant holds over by consent given, either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year. The moment the tenant is suffered by the landlord to enter on the possession of a new year, there is a tacit renovation of the contract for another year, subject to the same right of distress."

This is recognized as a correct statement of the law in *Silsby v. Allen*, 43 Vt. 172. In that case it was held that an estate at will was convertible into a tenancy from year to year by the payment of rent—not by the length of time that the tenant held and paid rent—but by the fact that he entered and held under a stipulation to pay annual rent, and paid accordingly. *Hall v. Wadsworth*, 28 Vt. 410; *Barlow v. Wainwright*, 22 Vt. 88.

In *Boudette v. Pierce*, 50 Vt. 212, the building leased for a stable was enlarged by the tenant, and without right used by him and his family as a tenement; *held*, that such use was in violation of and put an end to the contract, if the plaintiff had so elected; but that the defendant's continued occupancy for a succession of years and his payment of annual rent converted the tenancy, however it should be designated in its inception, into a tenancy from year to year. *Amsden v. Blaisdell*, 60 Vt. 386, is not at variance with this doctrine; on the contrary, it is there recognized that in order to convert a tenancy at will into one from year to year, an occupation for a second year must at least be entered upon. See *Stedman v. McIntosh*, 42 Am. Dec. 122 and notes; *Vrooman v. McKaig*, 59 Am. Dec. 85.

It would be a fair test of the soundness of this doctrine to inquire whether the tenant, having held over one full year after the termination of his written lease and entered upon a second year, could then quit the premises at pleasure without further liability to pay rent. That he could not is settled in *Barlow v. Wainwright*. See notes to this case in 52 Am. Dec. 79. In *Haynes v. Aldrich*, 133 N. Y. 287, it was decided that from the fact of the tenant's holding over after the expiration of his term, the law implied an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it was with the landlord and not with the tenant, and that the latter held over at his peril. In that case the tenant informed his landlord that he did not wish to renew his lease, and that he intended to surrender possession at its termination, but he was prevented from so doing for two days by his inability to procure trucks to move his goods, and by the illness of a boarder. It was held that these facts did not prevent such holding over from operating as a renewal of the lease for another year if the landlord elected so to treat it. In the note to that case in 28 Am. St. R. 636, it is said to be the general rule that if a tenant

for one or more years holds over, at the expiration of his term the landlord may treat him as a trespasser, or as a tenant for another year upon the terms of the prior lease, as far as applicable. Cases from New York, Rhode Island, Indiana and Minnesota, are cited in support of this doctrine.

Therefore, unless the defendant surrendered his right to the premises, and in legal effect admitted his liability for their use to December 26, 1892, it must be held that when the plaintiff brought the suit his claim for rent for any part of the quarter commencing November 1, 1892, had not matured, and that there was error in including in the judgment the items for "use of mill" and "rent and power" which became chargeable after that date.

It appeared that in September, 1891, the plaintiff requested the defendant to exercise his option, and that the latter declined to have the lease extended beyond November 1, 1891, for the reason that it was uncertain whether he could obtain logs for his business the next winter. But after that date he "stayed right along," as the plaintiff testified, with no new agreement as to his occupancy, and paid his rent as he had done under the written contract. After that year was completed he continued his occupancy, and was in possession of the premises on December 27 when the plaintiff's writ was served. The defendant claimed that there was a conversation in August, 1892, about his remaining till the next spring, but that it did not amount to an agreement. The plaintiff denied having such conversation.

We do not think that the defendant's deciding to vacate the premises, and his act of taking down and removing his machinery after the plaintiff's notice to him of December 26, can be construed as conferring upon the plaintiff a right of action for rent not then due. There was no surrender of the tenancy by the defendant nor acceptance thereof by the plaintiff. The plaintiff did not repudiate the relation of

landlord and tenant. He rendered monthly statements of rent to the defendant through the entire year 1892, as he had previously done, and thus recognized him as his tenant, though in his notice of December 26 he called him a tenant by sufferance.

If, at the expiration of the extended lease, the plaintiff had done no act recognizing a continued tenancy, the defendant would have been within the definition of those who come in by right and hold over without right. He would have remained merely by the plaintiff's laches as his tenant at sufferance. The plaintiff elected to recognize him as a tenant for another full year by taking his rent, and allowing him, without objection, to enter upon a second year. This, we think, made the defendant a tenant from year to year. He at least had a right to complete the year upon which he had thus entered.

Judgment reversed and cause remanded.

N. L. SHELDON ET AL.

v.

TOWN OF STOCKBRIDGE.

OCTOBER TERM, 1894.

*Right of town to receive bequests. For care of cemeteries.
For common schools. For relief of poor.*

1. Inasmuch as a town has power to raise money to keep in repair burial grounds, it may receive a bequest, the annual income of which is to be applied to beautifying and fencing a particular cemetery, upon condition that it will agree to keep good the principal fund through all time.
2. By voting to accept the bequest the town would become bound to fulfil the condition.
3. A bequest to a town, made previous to the passage of No. 20, Acts 1892, of a given sum, the income to be divided among the school districts of the town in proportion to the number of scholars attending school, was not rendered void by the passage of that act abolishing school districts and constituting each town a single district.
4. A bequest to a town "the income only to be used for the relief of the poor in said town," is not void for uncertainty.

Bill for the construction of a will by the executors. Heard at the December term, 1893, Windsor county. THOMPSON, Chancellor, decreed, among other things, that the town of Stockbridge was entitled to the bequests given to by the will. The heirs of Whitcomb appeal.

Those portions of the will material to the questions considered are as follows :

"I give the town of Stockbridge, in Vermont, one thousand dollars, to be invested in good real estate security; one-half of the interest of said thousand dollars shall be expended yearly on my lot in the cemetery at Stockbridge common in cultivating flowers, improving and beautifying said lot; and the other half of the interest of said thousand dollars shall be expended yearly in fencing, improving and beautifying said cemetery; and this gift shall be known as the Albert Whitcomb cemetery fund.

"In accepting this gift of a thousand dollars, the town of Stockbridge shall agree to keep good this amount through all coming time.

"I order the foregoing bequests to be paid as soon as convenient after my decease or according to the specification of each gift, and the remainder of my estate, both real and personal, shall be kept during the life of my sister, Mrs. Nancy B. W. Houghton, and then disposed of in the following manner: I give the town of Stockbridge, Vt., to be invested in safe securities, twenty thousand dollars; the income only shall be divided among the school districts of said town; each district shall receive an amount in proportion to the number of scholars attending school. No fractional district shall receive the benefit of this bequest.

"This gift shall be known as the Albert Whitcomb school fund.

"In case the town of Stockbridge does not accept the conditions herein named or violates said conditions, the twenty thousand dollars shall be given to the three grandchildren of my brother, the late Elias K. Whitcomb, to be divided equally among them when each is thirty years old.

"I give to school district No. 3, located in Bethel village and its suburbs, thirty thousand dollars, the principal to be safely invested, and the income only to be used each year for the current expenses of the school.

"This gift shall be known as the Albert Whitcomb school fund, and the legal name of the school shall be 'The Whitcomb High School.'

"In case this gift is not accepted or its conditions shall be violated, it shall be given to and divided equally among the three grandchildren of my brother and late Elias K. Whitcomb, when each is thirty years old.

"The remainder of my estate I give to the town of Stock-

bridge, in Vermont, the principal to be safely invested, and the income only to be used for the relief of the poor in said town. This gift shall be known as the Albert Whitcomb poor fund. If my estate shall not be sufficient to pay the several bequests herein named, the last shall be void. If what remains is not enough, then next to the last shall be void, and so on in this order until the property shall equal the bequests."

J. J. Wilson for the orators.

Samuel E. Pingree for the Whitcombs.

The condition precedent attached to the cemetery bequest cannot be performed, for the town has no authority to give such a guaranty. 2 Woerner's Am. Law Admin., 953; 4 Kent's Com., s. 125; 2 Redf., Wills., 3d Ed. p. 285, s. 9; Dill., Mun. Cor., 52.

The common school bequest cannot be carried out for the beneficiaries no longer exist. 4 Kent's Com., 126; *McAuley v. Wilson*, 1 Dev. Eq. 276.

The legacy to the town for the relief of its poor is void for uncertainty. *Trippe v. Frazier*, 4 H. & J. 446; *Wheeler v. Smith*, 9 How. 73; *Morris v. Bishop*, 10 Vesey 51.

W. E. Johnson for town of Stockbridge.

The bequest for the relief of the poor is valid. *McAllister v. McAllister's Heirs et al.*, 46 Vt. 272; *Clement v. Hyde*, 50 Vt. 716; *Burr's Exrs. v. Smith*, 7 Vt. 241; *Button v. American Tract Soc.*, 23 Vt. 336.

Fred Arnold for School District No. 3.

TAFT, J. There are six points made in the brief in behalf of the defendants Whitcomb.

I. That the cemetery bequest is void for the reason that

it is subjected to a condition precedent, which cannot be performed. The testator gives the town one thousand dollars, directing that the interest be expended annually; one-half in cultivating flowers on his burial lot in the cemetery at Stockbridge common, improving and beautifying it, the other half in fencing, improving and beautifying the cemetery.

The condition annexed to the bequest reads:

"In accepting this gift of a thousand dollars, the town of Stockbridge shall agree to keep good this amount through all coming time."

It is argued that the town has no power to bind itself by an agreement to keep the fund intact; that the statute does not empower it to enter into such an obligation.

It is true the town possesses limited powers only, such as are given it by statute, and those necessarily implied, in order to carry out its express powers. It can raise money to carry out the powers expressly given it, and for expenses incident to such purposes; it can always vote to raise money to pay expenses incurred in discharging duties imposed upon it by law.

Under R. L., s. 3192, towns have power to raise money to buy and keep burial grounds in repair and to fence them, and the selectmen may make all necessary regulations for the purpose of keeping them in proper order.

These duties, in respect to cemeteries, may be executed at the expense of the town, and for that purpose towns may vote to raise money.

It is for such purposes that the testator requires the interest of the one thousand dollars to be expended annually. A cemetery may be kept in repair and in proper order by cultivating flowers, improving and beautifying lots and the cemetery, and fencing the cemetery.

A town having power to raise money for the purposes specified in the gift, a majority of the court hold that it may

accept a gift, the interest of which is required to be expended for that purpose, even if the gift is coupled with the condition to keep the principal sum intact or good through all coming time. We think the vote of the town accepting the bequest binds it to the performance of the condition. It cannot accept the gift except upon the terms upon which it is given.

II. The second point is raised upon the bequest of twenty thousand dollars to the town of Stockbridge for the support of common schools.

The testator directs that the income of the fund shall be annually divided among the school districts of said town, each district to receive an amount in proportion to the number of scholars attending school; no fractional district to receive the benefit of the bequest.

At the time of the execution of the will, and at the death of the testator, the law in relation to school districts in the town was R. L., s. 499, reading as follows:

“When the inhabitants of a town can not be conveniently accommodated in one district, such town shall, at a meeting warned for the purpose, divide the town into several districts and determine their limits.”

At that time nearly every town in this state had what is called the School District System, and was divided into several districts, generally from two to twenty, each district being a corporation by itself. Whether, at that time, there were more than one school district in the town of Stockbridge is not alleged in the bill, unless argumentatively in the averment that No. 20, Acts 1892, was passed, in effect consolidating all school districts in the town of Stockbridge into one school district. By s. 1, No. 20, Acts 1892, each town was constituted a single district for school purposes, and the division of towns into school districts theretofore existing was abrogated, except for the settlement of their pecuniary affairs; but school districts organized under special acts of the Legislature, were not affected by the act,

unless they voted to become a part of the town system. The defendants Whitcomb contend that the then school districts having been consolidated, there was no one to take under the will, and that the distribution of the income of the fund cannot be made in consonance with the requirements of the will, and therefore the bequest is void, as it is coupled with a condition impossible of performance. The gift is not made in terms to the school districts; the testator says:

"I give the town of Stockbridge, Vt., to be invested in safe securities, twenty thousand dollars; the income only shall be divided among the school districts of said town. Each district shall receive an amount in proportion to the number of scholars attending school. No fractional district shall receive the benefit of this bequest. This gift shall be known as the Albert Whitcomb school fund."

It is not stated in the will for what purpose the income is to be used, but it is evident that the testator intended its use for the support of schools, as that is the only purpose for which school districts are organized; and it is also evident from the fact that the income is to be divided in proportion to the number of scholars attending school.

As early as 1787 it was enacted that towns might divide themselves into school districts, and from that day to this it is matter of common knowledge that the school districts have been constantly changed in respect to their territory; a part of one district has been annexed to another, districts have been consolidated and others divided; and it was a very common thing to see in the warnings of the annual town meetings an article, "to see if the town will make any changes in the school districts."

We think that anyone, in the execution of a bequest like the one under consideration, must have had in mind the constant changes so taking place.

The purposes and object of the gift can be accomplished, irrespective of the exact lines of division between the districts; and we see no reason whatever in thinking that the

testator had in mind that the bequest would fail if any changes were made in the school district lines, nor that he intended it.

The town now constitutes a single district, and it is provided in the act that schools shall be held at such places and at such times as, in the judgment of the board of directors, will best subserve the interests of education, and give all the scholars of the town as nearly equal advantages as may be practical; to make the matter as even as practicable, the school board is authorized to use not exceeding one-fourth of the school money for the purpose of conveying scholars to and from the schools.

The object, therefore, of the bequest can be as fully and completely attained when the town constitutes one school district as though there were many, and the beneficiaries are the same and take in the same manner.

If there had been twenty districts when the legacy vested, and the town subsequently made ten in place of them, or had increased the number, would such diminution or increase have forfeited the legacy? We think not.

The legacy was given to the town of Stockbridge for the purposes of common school education, the income to be divided among the districts in proportion to the scholars. If there is but one district, then it is to be paid to that.

In case the act of 1892 had not been passed, would any one claim, that in case an alteration had been made in the boundaries of each school district, by placing one or more families belonging in one district in an adjoining one, that the school district corporation became thereby so changed as to forfeit the bequest? Such construction would be erroneous, but would be the result in case the principle contended for is adopted. The town has complied with the conditions of the bequest by voting to accept it.

III. The third point is material only in case the gift to

the town of Stockbridge, for the common schools, is held null. It is for that reason not considered.

IV. It is claimed that the legacy constituting the town of Stockbridge the residuary legatee of the testator's estate, is void for uncertainty. Were this a new question in this state it might merit fuller examination than we are inclined to give it, but in view of the adjudications by this court, we do not think this question an open one.

The cases in which it has been under consideration are, *Exrs. of Burr v. Smith*, 7 Vt. 241; *Button v. American Tract Society*, 23 Vt. 336; *McAllister v. McAllister*, 46 Vt. 272, and *Clement v. Hyde*, 50 Vt. 716.

The bequest is for the "relief of the poor of said town." In the *McAllister* case, *supra*, the income of the gift was for the benefit of the "freedmen of the nation," and in *Clement v. Hyde*, *supra*, it was to be expended in the education of the scholars of poor people in the county of Orange. These two bequests were held not void for uncertainty. Following this line of construction we must hold the one under consideration valid.

It is only necessary to refer to these cases to see that the gift is not void for uncertainty.

V. We think the legacy to the town of Stockbridge for its common schools vested at the death of the testator; but in the view we take of the character of the bequest, it is immaterial whether it vested then or at the death of Mrs. Houghton.

VI. No question is made in regard to the legacy given school district No. 3 in Bethel, as that district was not abolished by the act of 1892, having been organized under a special act of the Legislature.

It is stated in the brief that in case the legacy does not vest until the death of Mrs. Houghton, and school district No. 3 in Bethel becomes extinct, the legacy fails or lapses;

but we do not consider this question, as there is no occasion at this time to do so.

The district is still an existing corporation. What question may arise upon its dissolution we are not required and it is not proper for us to pass upon.

The above disposes of all the questions suggested.

Decree affirmed and cause remanded.

Taft, J., doubting and Munson, J., dissenting on the first point.

Start, J., did not sit, having been of counsel for one of the parties in interest.

MARCUS NORTON, ADMR.,

v.

FRANK S. HENRY ET AL.

JANUARY TERM, 1895.

When release by mortgagee may discharge mortgagor who has conveyed.

If a mortgagor conveys the mortgaged premises upon condition that the grantee shall assume and pay the mortgage, and the grantee subsequently conveys a part of the same premises, which the mortgagee releases upon receiving the proceeds and applying them upon the mortgage, the mortgagor is not thereby discharged from the balance of the mortgage debt.

Debt on bond. Heard upon the report of a referee at the September term, 1894, Washington county, MUNSON, J., presiding. Judgment for the plaintiff for the sum found due. The defendant excepts.

Dillingham, Huse & Howland for the defendant.

When Mower accepted the deed of the equity of the defendants he became in equity the principal on this bond, the defendants being sureties. *Belmont v. Coman*, 22 N. Y. 438; *Marsh v. Pike*, 10 Paige Ch. 595; *Paine v. Jones*, 76 N. Y. 278; *Cornell v. Prescott*, 2 Barb. 16; *Comstock v. Drohan*, 71 N. Y. 12; *Flagg v. Gillmacker*, 98 Ill.

293; *Thorp v. Coal Company*, 48 N. Y. 256; *Bentley v. Vanderheyden*, 35 N. Y. 680; *Russell v. Pister*, 3 Seld. 171; *Ferris v. Crawford*, 2 Denio 595; *Marsh v. Pike*, 10 Paige 595.

The mortgaged premises were the primary fund for the payment of this indebtedness. *Johnson v. Zink*, 51 N. Y. 336; *Jumel v. Jumel*, 7 Paige 591; *Halsey v. Reed*, 9 Paige 453; *Marsh v. Pike*, 10 Paige 595; *Cherry v. Monroe*, 2 Barb. Ch. 629.

The plaintiff's testate by releasing the land discharged the defendants. 1 Sto., Eq. Jur., s. 325; *Baker v. Briggs*, 8 Pick. 122; *Craythorne v. Swinburn*, 14 Ves. 162; *Hodgson v. Shaw*, 3 M. & K. 183; *Matthews v. Aiken*, 1 Comst. 539; *Bangs v. Strong*, 4 Comst. 315; *Classen v. Morris*, 10 Johns. 539; *Hayes v. Ward*, 4 Johns. Ch. 130; *Townsend Savings Bank v. Munson*, 47 Conn. 399; *Cummings v. Little*, 45 Me. 187; *Glazier v. Douglass*, 32 Conn. 399; *Remick v. Ludington*, 14 W. Va. 383; *Rosborough v. McAliley*, 10 S. Car. 245; Pom., Eq. Jur., 1419.

H. W. Kemp and *John H. Senter* for the plaintiff.

The defendants claim no more than the full value of the mortgaged premises, and this they get under the report of the referee. *Savings Bank v. Thayer*, 136 Mass. 459; *Jones, Mort.*, s. 678a.

START, J. The defendants executed a mortgage of the High Rock Spring premises at Saratoga Springs, N. Y., conditioned for the payment of thirteen thousand eight hundred and seventy-five dollars, and gave their joint and several bond conditioned for the payment of the same sum. Defendants Frank S. Henry and Harvey R. Henry conveyed their shares in the equity of redemption in the premises to one Mower, and Mower assumed and agreed to pay

the mortgage debt pro rata according to the interest of his grantors. Mower and defendant Lance quit-claimed the entire premises to Walter S. Henry, and he conveyed the same to one Young. Young mortgaged the entire premises to the plaintiff's testate to secure the payment of the sum of three thousand dollars. The mortgage and bond so executed by the defendants were duly transferred to the plaintiff's testate. Young conveyed a part of the premises, known as the Front street property, to Tromlees for two thousand seven hundred and fifty dollars. This sum was paid to the plaintiff's testate, and by him applied upon the debt secured by Young's mortgage; and he, without the knowledge of defendant Harvey R. Henry, released the property conveyed to Tromlees from the mortgage executed by the defendants. The plaintiff brought suit to foreclose the defendants' mortgage, and the property not conveyed to Tromlees was duly sold, and the proceeds applied upon the debt evidenced by the defendant's bond and mortgage. The referee, with the consent of the plaintiff, applied the two thousand seven hundred and fifty dollars received for the Front street property upon the debt evidenced by the defendants' bond, and found a deficiency with interest of two thousand one hundred thirty-one dollars and sixty-four cents, and awarded that the plaintiff recover this sum of defendant Harvey R. Henry; and the court below rendered judgment accordingly.

Defendant Harvey R. Henry claims that he was released from further liability upon his bond by the discharge of the Front street property from his mortgage. No other defence is suggested in the defendants' brief, and this is the only question we are called upon to consider. While the authorities upon this question are conflicting, we hold that defendant Harvey R. Henry was not discharged from further liability upon his bond. When a mortgagor, who is personally liable for the mortgage debt, conveys the mortgaged

premises subject to the mortgage incumbrance, and his grantee assumes and agrees to pay the mortgage debt as between the parties, the grantee becomes the principal debtor, the mortgagor the surety, and mortgaged premises the primary fund for the payment of the mortgage debt; and the mortgagor has a right to have the premises applied to its payment. Under such circumstances a mortgagee, having notice of such agreement, has no right to release any security which he holds, if the mortgagor is thereby exposed to a personal liability for the mortgage debt which he would not otherwise incur; and if, under such circumstances, he does dispose of the mortgage security or any part of it without the mortgagor's consent, he must see to it that the mortgagor is not thereby damnified. If he does thus protect the mortgagor, the mortgagor has no just ground for complaint; and he is not discharged from personal liability for the balance of the debt. He cannot claim immunity from the mortgage debt beyond the extent of his injury. *Worcester Mechanics Savings Bank v. Thayer*, 136 Mass. 459.

Judgment affirmed.

STATE v. D. TOMASI.

JANUARY TERM, 1895.

Sale of intoxicating liquor. Knowledge not essential.

Under the statutes prohibiting the traffic in intoxicating liquor, ignorance of the nature of the thing sold is no excuse.

Information for keeping a nuisance. Plea, not guilty. Trial by jury at the September term, 1894, Washington county, MUNSON, J., presiding. Verdict guilty. The respondent excepts.

George W. Wing and F. L. Laird for the respondent.

Ignorance of fact unaccompanied by criminal negligence exempts from criminal responsibility. *Com. v. Presby*, 14 Gray 65, 67; *Com. v. Cheney*, 141 Mass. 102; *Stearn v. State*, 53 Ga. 229, 230; *Rich v. State*, 63 Ga. 616, 620, 621; Bishop's New Crim. Law, 301; Bish., Stat. Cr., p. 1022, and cases there cited; *State v. McDonald*, 7 Mo. Ap., 510; *Crabtree v. State*, 30 Ohio St., 382; *Adler v. State*, 55 Ala. 16; *Robisus v. State*, 63 Ind. 235, 67 Ind. 94; *Moore v. State*, 65 Ind. 382; *Kreamer v. State*, 106 Ind. 192; *Ward v. State*, 48 Ind. 289; *Marshall v. State*, 49 Ala. 21.

Zed S. Stanton, State's Attorney, for the State.

Under our statute forbidding the sale of intoxicating

liquor, ignorance is no excuse. *Com. v. Boyinton*, 2 Allen 160; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Hallett*, 103 Mass. 452; *Byars v. City of Mount Vernon*, 77 Ill. 467; *Com. v. Farrers*, 9 Allen 489; *State v. Hopkins*, 56 Vt. 250.

TAFT, J. But one question arises in this case. The jury were instructed that if the respondent sold what was in fact lager beer, he might be found guilty even though he did not know nor suppose that the article was lager beer. The respondent insists that the charge so given was erroneous, claiming that ignorance of fact, unaccompanied by any negligence, exempts one from criminal responsibility. If knowledge of certain facts is necessary to constitute an offence, the respondent can always show an ignorance of such facts in defence, or, rather to insure a conviction, it is incumbent upon the prosecution to show the respondent's knowledge; e. g. It is an offence to pass counterfeit money, knowing it to be counterfeit; to convict, the prosecution must always show the respondent's knowledge of its baseness. The case cited by the respondent, *Crabtree v. State*, 30 Ohio St. 382, is of this class; the statute prohibited the sale of liquor to a person by one *knowing him*, the vendee, to be a person in the habit of getting intoxicated. It was held necessary to show knowledge of the respondent of the person's habit. The rule in most instances seems to be this: If to constitute an offence, knowledge of certain facts is essential, it must invariably be shown that the respondent has such knowledge; but if a statute makes an act penal, without reference to knowledge, it is then unnecessary to show it, and ignorance of the fact is no defence. The rule may be stated in other words, thus: If a statute commands that an act be done or omitted, which in the absence of the statute would be blameless, ignorance of the fact or state of things contemplated by the statute will not excuse its viola-

tion. The charge of the court was in accord with the rule as stated in *State v. Hopkins*, 56 Vt. 250. For the many cases in which the same doctrine is held see *People v. Roby*, 52 Mich. 577, and *Farrell v. State*, 32 Ohio St. 456 (30 Am. Rep. note, p. 617). A case much in point may be found in the English Exchequer, *Reg. v. Woodrow*, 15 M. & W. 404. The respondent was tried, that eminent jurist, Sir Frederick Pollock, C. B., presiding, upon the charge of having in his possession adulterated tobacco, the defence being that he purchased it as genuine, and had no knowledge nor cause to suspect that it was not so. His counsel argued that in order to enable the respondent to ascertain the character of the tobacco, a nice chemical analysis might be required; but he was interrupted by Park, B., who said:

"You must get some one to make that nice chemical analysis, or, you must rely upon the manufacturer or dealer who sells to you, and take your remedy against him."

It appears from the exceptions that a "nice chemical analysis" of the beer in question was made, presumably at the expense of the state. It would have been a better and wiser thing for the respondent if he had had one made prior to his purchase, and then obeyed the law. Exceptions overruled.

Judgment of guilty upon the verdict affirmed; execution of sentence ordered.

C. H. CROSIER v. GEORGE STILLSON.

JANUARY TERM, 1895.

Writ of replevin. Where returnable. May be served in another county when situs of goods changed.

Motion to dismiss.

1. A writ in replevin must be made returnable in the county where the goods are detained at the time the suit is begun; and if they are afterwards removed into another county, it may be served there.
2. Upon a motion to dismiss, the statement in the declaration of the place where the property is detained controls as against the return of the officer that he served the writ in another county.

Replevin for a mare. Heard upon the defendant's motion to dismiss at the September term, 1894, Rutland county, START, J., presiding. The motion was overruled, and the defendant excepted.

J. C. Baker for the defendant.

The detention and not the original taking determines the venue. *Rowe v. Hicks*, 58 Vt. 18.

Fayette Potter for the plaintiff.

The writ shows that the property was detained in Rutland county, hence the suit was properly made returnable there.

TAFT, J. This is an action of replevin, returnable in

Rutland county. The writ was served at Rupert in Bennington county. It is provided in R. L., s. 1231, that when a writ of replevin for goods and chattels is issued, it "shall be returnable to the county court for the county in which the goods are detained." The defendant moved to dismiss the action, for that it appears from the writ and officer's return that the property replevied was detained at Rupert in Bennington county, and that the action could be commenced and prosecuted only in that county. It is alleged in the declaration that the detention of the mare replevied was at Pawlet in Rutland county. The return of the officer shows that the writ was served in Bennington county. If the mare was detained at Pawlet, and we must be governed in that respect by the declaration, the writ was properly made returnable in Rutland county. Property detained in one county may be sued for in replevin, and the writ served in another county, if the situs of the property in the meantime has been changed. Such seems to be the case under consideration. The motion to dismiss was properly overruled.

Judgment affirmed and cause remanded.

SCHOOL DISTRICT NO. 20 IN CHESTER

v.

F. W. PIERCE ET AL.

JANUARY TERM, 1895.

Act abolishing school districts. Supplies on hand pass to town.

Wood on hand for use in a school district at the time of the passage of No. 20, Acts 1892, abolishing school districts, became the property of the town for school purposes.

Trover for a quantity of wood. Plea, the general issue. Heard upon an agreed statement of facts at the May term, 1894, Windsor county, THOMPSON, J., presiding. Judgment for the defendants. The plaintiff excepts.

George L. Fletcher for the plaintiff.

L. M. Read for the defendants.

START, J. In this action the plaintiff seeks to recover the value of a quantity of wood which it had on hand for use in its schoolhouse when No. 20, of the Acts of 1892, took effect. The wood was taken and used in the schoolhouse, under the direction of the school directors for the

town of Chester. The court below rendered judgment for the defendants to recover their costs. The case of *Town School District of Barre v. School District No. 13 of Barre*, 67 Vt., is full authority for this holding.

Judgment affirmed.

ADMR. OF JANE LEONARD

v.

EXR. OF JERRY LEONARD.

JANUARY TERM, 1895.

*Probate court has no jurisdiction of equitable claims.
Amendment of declaration in county court.*

1. Upon an appeal from the disallowance of a claim by the probate court, the county court may allow the filing of a declaration in account in place of a declaration in assumpsit for the same cause of action.
2. Where the origin of the claimant's title is purely equitable, the probate court has no jurisdiction.
3. The testimony tended to show that the intestate of the defendant held title to a farm, which had been partly paid for by the money of the plaintiff's intestate; that said farm had been sold, and the entire avails paid to defendant's intestate. *Held*, that the probate court had no jurisdiction of the claim of the plaintiff's intestate to a portion of such avails.

4. The equitable powers conferred upon law courts in connection with the action of account have reference to the administration of suits where the title of the parties is legal. They do not confer jurisdiction where the title is equitable.

Appeal from the probate court for the district of Rutland. Trial by jury at the September term, 1893, Rutland county, TYLER, J., presiding. The court directed a verdict for the defendant. The plaintiff excepts.

The evidence of the plaintiff tended to show that his intestate, Jane Leonard, her sister Nancy Leonard, and the defendant's intestate, Jerry Leonard, their brother, lived together as one family, carrying on different farms in the town of Rutland for many years; that subsequently they purchased a farm in Pittsford, upon which they continued to live until after the death of the two sisters; that they paid a portion of the purchase price down and gave a mortgage for the balance; that the amount which they paid down belonged to the three jointly, and that the mortgage was subsequently paid off with money produced by their joint efforts.

Nancy died in 1884, and Jane in 1886. Soon after the death of Jane, Jerry sold the farm and stock, receiving his pay therefor in money. The evidence of the plaintiff tended to show that after the sale he admitted to various persons that his sisters had an interest in the property.

The declaration of the plaintiff was in general assumpsit. After the conclusion of the plaintiff's testimony, the defendant moved the court to direct a verdict in his favor, for that if the plaintiff had any cause of action it was not in assumpsit, but in account. Thereupon the plaintiff moved the court for leave to file a declaration in account as an amendment of the declaration in assumpsit already on file. The court held, as a matter of law, that the declaration could not be so amended in the county court, to which the plaintiff excepted.

George E. Lawrence for the plaintiff.

The amendment to the declaration should have been allowed. *Brown v. Brown*, 66 Vt. 76.

J. C. Baker for the defendant.

The request of the plaintiff to amend his declaration after verdict was properly denied. It entirely changed the grounds of his recovery, and was practically the beginning of a new suit. *Carpenter v. Gookin*, 2 Vt. 495; *Train v. James*, 11 Vt. 444; *Austin v. Burlington*, 34 Vt. 506; *Hill v. Smith*, 34 Vt. 535; *Dana v. McClure*, 39 Vt. 197; *Brodict v. Hirshfield*, 57 Vt. 12; *May v. Williams*, 3 Vt. 239.

ROSS, C. J. The county court erroneously, held as a matter of law, that the appeal papers could not be amended in that court, and for that reason it could not allow the plaintiff to amend his declaration by filing a declaration in account. *Brown v. Brown*, 66 Vt. 76; *Cutting v. Est. of J. W. Ellis*, reported in this volume.

But if it had allowed the amendment, it would not have availed the plaintiff. The claim, if any, in favor of the plaintiff estate against the defendant estate is equitable in its origin, and in the extent of the plaintiff's right. Of such claims the probate court has not jurisdiction. At law, the title to the farm in Pittsford, and the title to the money coming from its sale, were vested in Jerry Leonard, and at law the plaintiff estate could not establish that there was a resulting trust therein in its favor, nor could it establish the extent or amount of such trust interest. The equity powers conferred upon the probate court and upon appellate courts of law do not extend to the establishment of purely equitable claims and equitable rights. *Mann v. Mann*, 53 Vt. 48; *Graves v. Wakefield*, 54 Vt. 313; *Little v. Dwinell*, 57 Vt. 311; *Purdy v. Purdy*, 67 Vt. 50.

The testimony in the county court tended to establish that

the money used in making payment for the purchase of the farm in Pittsford, the title to which was taken to Jerry Leonard, in part belonged to each of his sisters, Nancy and Jane, and that the mortgage given to secure the balance of the purchase money was paid in part with money belonging to each of them. To the extent that the money belonging to each sister went to make the first payment for the farm, and probably to make payment of the mortgage given to secure the payment of the balance of the purchase money, on the facts which the testimony tended to establish, there was in equity a resulting trust therein to her vested in Jerry Leonard. To establish this trust and to ascertain its extent, resort must be had to a court of equity. *Pinney v. Fellows*, 15 Vt. 525.

Revised Laws, 1214 to 1217, conferring certain equity powers upon courts, which have jurisdiction of the action of account in such action, is confined to actions in which the legal title to the property brought into contention exists in the parties as co-partners, co-tenants or co-parceners. But where the parties' rights are strictly equitable in their origin and extent, the action of account cannot be maintained. *Cearnes v. Irving*, 31 Vt. 604. There is no allusion to the acts of 1852 and 1853 embodied in R. L., 1214 to 1217, in *Cearnes v. Irving*. Yet that action was brought after those acts were passed. Besides, the grounds of that decision show that the acts of 1852 and 1853, giving courts at law certain equitable powers, are not applicable to the case at bar. A resort to equity being necessary to establish both the right and the extent of the right of the plaintiff estate in the defendant estate, assumpsit could not be sustained to enforce it.

There is another objection to the maintenance of either assumpsit or account. The right of the three estates on the facts which the testimony tended to establish are intermingled in such a manner that each estate has the right to be

heard in regard not only to its own right and the extent of it, but as an incident to its rights in regard to the right and its extent of each of the other estates. Hence, it is necessary to have all the estates before the court that its judgment may bind all. The estate of Nancy is not made party to this proceeding, and probably could not be. If no administration has been, nor should be, taken on that estate, a court of equity could bring before it and adjudicate the rights of those who may be entitled to that estate.

Judgment affirmed.

STATE v. EDWIN J. CAMLEY.

OCTOBER TERM, 1894.

Indictment for perjury. Stenographer may read testimony of former trial.

1. An indictment in accordance with No. 29, Acts of 1890, "An act to simplify indictments for perjury," is sufficient.
2. The testimony of the respondent upon the former trial, in which it is alleged that the perjury was committed, may be read as evidence by the stenographer who took it.

Indictment for perjury. Heard upon demurrer to the indictment at the March term, 1894, Washington county, TYLER, J., presiding. Demurrer overruled. The respondent excepts. Exceptions ordered to lie. The respondent

thereupon plead not guilty, and a trial by jury was had at the same term. Verdict guilty. The respondent excepts.

The indictment was as follows :

“Be it remembered, that at a county court begun and holden at Montpelier, within and for the county of Washington, on the second Tuesday of September, in the year of our Lord one thousand eight hundred and ninety-three, the grand jurors within and for the body of the county of Washington aforesaid, now here in court duly empanelled and sworn, upon their oath present that Edwin J. Camley, otherwise called Ed. Camley, of Duxbury, in the county of Washington aforesaid, on the eighteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two, appeared and testified as a witness in a prosecution in which the State of Vermont and W. Henry Pixley were parties, the said prosecution then and there being heard and tried before the county court within and for the county of Washington aforesaid, at a term thereof begun and held at Montpelier aforesaid on the second Tuesday of September, in the year of our Lord one thousand eight hundred and ninety-two, the said county court then and there being a tribunal of competent jurisdiction; and that the said Edwin J. Camley, otherwise called Ed. Camley, then and there before said county court being sworn to tell the whole truth and nothing but the truth, relative to the said prosecution then and there being tried, then and there committed the crime of perjury, and then and there falsely testified in answer to interrogatories substantially as follows :

“Question. Whereabouts do you live and did you live last April? Answer. In Stowe.

“Q. With your brother, Will Camley? A. Yes, sir.”

[Here is set forth in the form of questions and answers the stenographic transcript of the testimony.]

“Which said testimony was material to the issue then and there pending in said prosecution, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.”

George W. Wing and *W. A. Lord* for the respondent.

The indictment is insufficient. This being a common law crime, not defined by statute, it can only be charged by the

use of those words and terms which the common law has designated as apt thereto.

Neither that the respondent was sworn, nor the falsity of his testimony nor its materiality are set forth. *State v. Smith*, 63 Vt. 201; *State v. Hodgson*, 66 Vt. 151; R. L., s. 689; *State v. Fiske*, 66 Vt. 437; *Rex v. Horne*, Cowper 672; *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 Vt. 439; *State v. Daley*, 41 Vt. 564; *State v. Matthews*, 42 Vt. 542; *State v. Clark*, 44 Vt. 636; *State v. Benjamin*, 49 Vt. 101; *State v. Higgins*, 53 Vt. 198; *State v. Miller*, 60 Vt. 90; *State v. Campbell*, 94 Am. Dec. 25; *United States v. Mills*, 7 Pet. 138; *United States v. Simmons*, 96 U. S. 360; *United States v. Carle*, 105 U. S. 611; see, also, cases cited in these opinions.

Zed S. Stanton, State's Attorney, for the State.

START, J. This cause comes to this court on exceptions taken by the respondent to the overruling of his demurrer to the indictment, and to the admission of certain evidence. The indictment is drawn in compliance with No. 29, of the Acts of 1890, entitled "An act to simplify indictments for perjury," and is sufficient, provided the respondent is informed, with reasonable certainty, of the cause and nature of the accusation against him.

By the indictment the respondent is informed that, on the eighteenth day of October, 1892, he appeared as a witness in a proceeding in which the State of Vermont and W. Henry Pixley were parties, then and there being heard before a tribunal of competent jurisdiction; that he then and there committed the crime of perjury by testifying, in answer to interrogatories, in substance as is set forth in the indictment; and that his testimony was material to the issue then and there pending. By these allegations the respondent is informed of the cause and nature of the accusation against him. He is informed that he committed the crime of per-

jury by giving certain testimony set forth in the indictment, before a tribunal of competent jurisdiction, at a certain time and place in a specified cause; and that his testimony was material to an issue then and there being tried. This is all that is required by the act of 1890 or the constitution. Under this act it was not necessary to allege that the respondent was legally sworn; that his testimony was false, or that he wilfully testified falsely. These are included in the allegation that he committed the crime of perjury by giving the testimony set forth in the indictment. The word perjury has, by the common law, a well defined legal meaning, and the respondent is charged with knowledge of its meaning; and when he is informed that he is charged with the commission of the crime of perjury by giving certain testimony, he is sufficiently informed that it is claimed that he was lawfully sworn, that his testimony was false, and that he wilfully and corruptly testified falsely.

In *State v. Carson*, 59 Maine 137, under a statute like our own, it is held that an indictment like the one under consideration is sufficient. It is claimed that the crime of perjury is defined by the Maine statute; that in this state we have no statute defining the crime; and that for this reason the case under consideration should be distinguished from the case above cited. Perjury as defined by the Maine statute is substantially the same as defined by the common law. There being no statute in this state defining it, we are referred to the common law for its meaning. R. L., s. 689. The common law definition is as binding as it would be if it were a legislative enactment. When the act of 1890 was passed, the common law definition of the crime of perjury was its definition in this state, and the Legislature had the power to provide a form of indictment without further defining its meaning.

For the purpose of showing the materiality of the respondent's testimony upon the issues in the case, in which it was

claimed that he gave false testimony, the court, subject to the respondent's exception, allowed the evidence taken on that trial to be read by the court reporter who took the same. It was permissible to show what the respondent's testimony was in the cause in which it was claimed he testified falsely, and it does not appear that more than this was done. The testimony is not referred to, and there is nothing before us from which we can determine what evidence was read to the jury. Only the respondent's evidence may have been read; we cannot presume that other evidence was read. The testimony of the respondent on the former trial could be shown as well by the court reporter as by any other person. He heard the testimony and had taken it down, and it was not error to allow him to read from his minutes. The respondent was confronted by a witness who was narrating his testimony, given on the former trial. He had a right to cross-examine the witness, and it does not appear that the right was denied.

Exceptions not sustained; judgment on the verdict; sentence passed, and execution thereof ordered.

SARAH B. BOOMHOWER

v.

JOSHUA C. BABBITT'S ADMR.

OCTOBER TERM, 1894.

Construction of will. Whether bequest is of specific sum, or income of fund. Settlement of executor's account. Legacy, when payable.

1. The testator bequeathed his daughter an "annuity and sum yearly" of three hundred and sixty dollars, and directed his executors to set apart six thousand dollars and keep the same invested in real estate securities, the income thereof to be used in the payment of this legacy. *Held*, that under the provisions of the will the daughter was entitled to the payment of the three hundred and sixty dollars, irrespective of what income the fund so set apart might yield.
2. The allowance of an account of the executors in which they were credited with six thousand dollars set apart for this purpose, would not constitute an adjudication that the daughter was entitled only to the income of that fund.
3. Under the terms of the will the legacy would be payable at the end of one full year from the death of the testator, and so from year to year thereafter.

Appeal from an order of the probate court for the district of Franklin. Heard upon the report of a referee at the September term, 1894, Franklin county, ROWELL, J., presiding. Judgment *pro forma* affirming the decree of the probate court. The defendants except.

The defendants were the administrators of the estate of J. C. Babbitt, and the question was whether, under the terms of his will, his daughter, the petitioner, was entitled to the full sum of three hundred and sixty dollars annually, or to the income of a fund of six thousand dollars, less taxes and the expense of caring for the same, which the executors had set apart according to the will. The probate court decreed her the three hundred and sixty dollars annually.

The provisions of the will in controversy were as follows :

“I give, grant, and bequeath to my daughter, Sarah Babbitt, during her life, the annuity and sum yearly of three hundred and sixty dollars, to be paid to her and for her from time to time during each year as may be needed and required, and to be paid by my said executors. And to the end that the payments of the annuities or yearly payments aforesaid may be effectually secured and the same duly paid, it is my will that eleven thousand dollars (\$11,000) of my estate shall not be received and divided until the said annuities or yearly payments be completed and cease to become due; but the same sum of eleven thousand dollars of my estate shall, until the same annuities cease to become due, rest in the hands and be under the management and investment of my executors hereinafter appointed, to be placed and kept at interest on what my said executors shall judge to be good real estate security, and the interest or income therefrom to be applied and used in payment of the above mentioned annuities for the benefit of my said wife, Cordelia E. Babbitt, and daughter, Sarah Babbitt. But at the death of my said wife Cordelia, or daughter Sarah, it is my will that so much of the said eleven thousand dollars resting in the hands of my executors as shall not be necessary to secure the payments of the remaining annuity, to be distributed or divided as hereinafter provided.

I also give authority to my executors hereinafter named and appointed, in case the aforesaid provisions made for my said wife Cordelia, and daughter Sarah, are not sufficient to furnish them a suitable and comfortable support, to take from the aforesaid eleven thousand dollars such sums as may be necessary and requisite to furnish them with all nec-

essaries and comforts during life, and the necessity of this last provision I leave to the judgment of my executors."

The remaining facts appear in the opinion.

Hogan & Royce for the defendant.

The language of the will alone must govern. 1 Redf., Wills, 431-433; *Avery v. Chappel*, 6 Conn. 270, 275.

The petitioner can only have the income of the fund invested by the executors. *Orr v. Moses*, 52 Me. 287; *Nutter v. Vicery*, 64 Me. 490; *Kendall v. Russell*, 3 Sim. 424; *Comstock v. Herron et al.*, 55 Fed. Rep. 803; *Watts, Admr., v. Howard, Admr.*, 7 Met. 478; *Parsons v. Winslow*, 16 Mass. 361; *Bridge v. Bridge*, 146 Mass. 373.

The probate court had power to direct the investment of the fund. *Slanning v. Style*, 3 P. Williams 336.

H. A. Burt for the plaintiff.

The testator did not, by setting out the fund, limit the amount to be paid the plaintiff. *Bowen v. Dorrance*, 9 R. I. 557; *Paget v. Huish*, 1 H. & M. 663; *Armstrong's Appeal*, 63 Penn. St. 312, 316; *Merritt v. Merritt*, 43 N. J. Eq. 11; 2 Woer, Am. L. Admin., 1002; *Brimblecom v. Kaven et al.*, 12 Cush. 511; *Swett v. City of Boston*, 18 Pick. 123.

The payment of the legacy dates from the testator's death. *Craig v. Craig*, 3 Barb. Ch. Rep. 76; *Stephenson v. Axon & Mitchell*, Bailey's Eq. Rep. 274; *Hall v. Hall*, 2 McCord's Ch. Rep. 281.

MUNSON, J. The will of Joshua C. Babbitt contains certain bequests to his wife, among which is an "annuity and sum yearly" of three hundred dollars, to be paid her during life by his executors. The testator also gives to his daughter Sarah for life an "annuity and sum yearly" of three hundred and sixty dollars, to be paid her by his exec-

utors from time to time during each year as it may be needed. The will further provides, to the end that these annuities may be effectually secured and duly paid, that eleven thousand dollars of the estate shall remain undivided in the hands of the executors and be kept by them on good real estate security, and that the income therefrom shall be used in the payment of said annuities. It is further provided that upon the death of either annuitant so much of the eleven thousand dollars as shall not be necessary to secure the payment of the remaining annuity shall be distributed in accordance with subsequent provisions of the will. The testator also authorizes his executors, whenever in their judgment these provisions are insufficient for the comfortable support of his wife and daughter, to take from this eleven thousand dollars such sums as may be necessary to give them the required support.

The widow waived the provisions of the will, and received her dower and homestead and an assignment of personal property. After this the executors set apart a fund of six thousand dollars to provide an annual income of three hundred and sixty dollars for the daughter. About the time this appropriation was made, the executors delivered to the judge of probate an account in which the sum of six thousand dollars was charged as a "legacy to be invested for Sarah Babbitt as provided by the will." Three years later the probate court allowed, on notice to all persons interested, an account based upon the balance ascertained by such prior account.

This action of the probate court did not constitute an adjudication of the questions now raised. It was at most no more than an approval of the creation of a separate fund of six thousand dollars. The setting apart of that sum for investment was in harmony with a distinct requirement of the will, and did not involve a determination of the exact amount the beneficiary was to receive. The questions

whether the entire income of the sum set apart should be paid to the beneficiary, or whether she should in all circumstances be confined to the income received, were not necessarily raised by a consideration of the accounts. No such matter was in fact brought to the attention of the court or passed upon by it. So the claims made by this petition remained open questions.

The testator gives the petitioner a yearly payment of three hundred and sixty dollars, and directs the investment of an amount which at the legal rate of interest will produce that sum, and provides that the income of this fund shall be used in the payment of such bequest. The petitioner claims that this is a gift of an annuity, and that she is entitled to the payment of three hundred and sixty dollars yearly, whatever may be the expenses or receipts of the fund separately invested. The defendants insist that it is a gift of the income of six thousand dollars to be set apart for the petitioner's benefit, and that when this sum is separated from the body of the estate she is entitled only to the income of the fund so created, less the expenses of its management, and subject to such reduction as may result from a depreciation of the securities without their fault.

While the provisions of the will are not entirely clear and consistent, we think it satisfactorily appears from the instrument as a whole that it was the intention of the testator to give the petitioner the full yearly sum of three hundred and sixty dollars, without regard to the fate of the fund appropriated to its payment. The terms employed by the testator in directing the creation of a special fund are not consistent with their having any effect in limitation of the gift. The fund is set apart to the end that the annuity may be effectually secured and duly paid. The language points to the security and completeness of the yearly payments rather than to the relief of the body of the estate from future contingencies. The gift falls within that class of legacies called

demonstrative, in which the sum given is to be made good out of the general estate upon a failure of the particular fund which is primarily holden for its satisfaction. See *Paget v. Huish*, 1 Hem. & Mill. 663.

The decisions in the navy five per cent cases in England throw light upon this subject. In those cases certain yearly sums had been given by will, and various provisions made for their payment from dividends on the navy five per cent annuities. By the subsequent conversion of these five per cents into four per cents, the funds became insufficient to produce the yearly sums; and in a series of suits occasioned by this deficiency, the right of the annuitant to have the fund made good from the residue of the estate was considered.

In *Davies v. Wattier*, 1 Sim. & Stu., 463, the testator gave his wife two hundred pounds a year, to be paid by his executors out of his personal estate not specifically bequeathed. A decree was made that the executors transfer four thousand pounds of navy five per cent annuities and certain other stocks to a trustee, and that the annuity be paid out of the dividends accruing therefrom. The fund thus appropriated having become insufficient, it was held that as the annuity was a charge upon the whole of the residue, the annuitant was entitled to have the deficiency made good out of the other funds.

In *May v. Bennett*, 1 Russ. Ch. 370, the testator directed his executors to lay out in any government security they pleased as much money as would produce a certain annual interest for his wife. The executors purchased navy five per cent annuities to the required amount. Here it was considered that it was the testator's intention to secure to his widow a certain yearly sum, and not merely to require the setting apart of as much money as would produce that sum at the moment of appropriation, and that the difference should be made up from the general estate.

In *Kendall v. Russell*, 3 Sim. 424, a case relied upon by the defendants, the testator gave certain yearly sums, to issue from the dividends of a quantity of stock in the navy five per cent annuities sufficient to produce such sums, which stock was to be appropriated and invested in the names of his executors for this purpose. It was held that this was a gift of so much in the navy five per cents as would produce the annuity, that it was the intention of the testator that the appropriation of the stock designated should relieve the residue of his estate, and that the annuitants were not entitled to have the deficiency made up from the residue.

It will be noticed that in *Kendall v. Russell* the testator designated the stock to be set apart; and the opinion in that case distinguishes it from the two prior cases by this feature of the bequest. The case may be more particularly distinguished from the one at bar by the different terms employed in making the gift and providing the fund. In that case the yearly payments were given as sums to be derived from the stock designated. In this case there is an independent gift of the yearly sums, followed by a provision in regard to their payment. There the fund was set apart to produce the annuity. Here it is set apart to better secure the payment of the annuity. The expressions most strongly indicative of the testator's intention are so dissimilar in the two cases that the disposition of the one cited cannot be regarded as at variance with the conclusion reached in this.

The bequest being an annuity and not the income of a certain sum, the petitioner was entitled to a completed payment of three hundred and sixty dollars at the end of one year from the testator's death. 3 Redf. Wills 184. The petition raises no question as to whether the sums in arrear should have been paid at intervals within the year, and the petitioner can have interest on such arrearages only from the end of the year. Nor does the case present any ground upon which it can now be ordered that the annuity shall

hereafter be paid in quarterly instalments, as requested in the petitioner's brief. In the situation of the estate at the time of the decree appealed from, as shown by the report of the referee and the papers referred to, it was not error to order that the amount due be paid by the administrators out of any funds or property of the testator in their hands as such administrators.

Judgment affirmed and ordered certified.

CHESTER B. DODGE

v.

SOUTH ROYALTON GRADED SCHOOL DISTRICT.

JANUARY TERM, 1895.

District limits after the adoption of town system.

In 1847 plaintiff's farm, which was situate in the town of Royalton, was by the concurrent votes of the towns set from District No. 4 in Royalton to District No. 16 in Tunbridge. In March, 1893, by the concurrent votes of the two districts agreeably to No. 158, Acts of 1892, District No. 4 became a part of South Royalton Graded School District. April 1, 1893, by No. 20, Acts of 1892, each town was constituted a school district, and existing districts, excepting graded school districts, were abolished. *Held*, that thereafter plaintiff's farm belonged to Royalton, and not to the South Royalton Graded School District.

Assumpsit to recover a tax paid under protest. Heard

upon an agreed statement of facts at the December term, 1894, Windsor county, Ross, C. J., presiding. Judgment for the plaintiff. The defendant excepts.

The only question was whether the plaintiff's farm was within the territorial limits of the defendant. The facts fully appear in the head note and opinion.

Hunton & Stickney for the plaintiff.

THOMPSON, J. In 1847, the plaintiff's farm in School District 4 in Royalton, by proper proceedings, was set to School District 16 in Tunbridge, and continued a part thereof until that district was abolished April 1, 1893, by St. 1892, No. 20.

In March, 1893, School District 4 in Royalton became a part of the defendant district, but the plaintiff's farm was not thereby annexed to defendant, for it was then a part of district 16, and when that district was abolished it became, and still is, a part of the town school district of Royalton.

Judgment affirmed without costs.

GEORGE B. FOSTER'S EXECUTRIX

v.

H. M. STONE, ADMR., ET ALS.

OCTOBER TERM, 1894.

Special administrator. Compounding debts. Heirs estopped to complain. Administration in part faithful and in part unfaithful. Allowance for services and counsel fees.

1. A special administrator has no authority to compound a disputed claim, but if he does so in good faith, and those interested in the estate are present upon the settlement of his account and acquiesce in his action, they will be estopped from afterwards setting up his want of authority.
2. An administrator should be allowed nothing for services rendered in the maladministration of an estate; but if his administration has been faithful for a certain period, he may be allowed for services during that period, although his subsequent administration was unfaithful.
3. An administrator who has misappropriated to some extent the funds of an estate, may be allowed for counsel fees upon a final accounting in the probate court, if the necessity for such legal services does not arise from the fact of the misappropriation.

Appeal from an order of the probate court for the district of Franklin, settling the account of George B. Foster, administrator of George W. Foster's estate. Heard upon the report of a commissioner at the April term, 1894, TAFT, J., presiding. Judgment that the estate of George B. Foster

account to the estate of George W. Foster for the amount found due by the commissioner, without credit for the services of George B. Foster as administrator, or for the amount paid for counsel fees for services upon the settlement of his account in the probate court; that nothing be allowed for storing goods after November 30, 1890, and that six per cent interest be computed on all sums appropriated by George B. Foster from the date of their appropriation, and on all sums in his hands after November 30, 1890. Both parties except. The opinion states the case.

Wilson & Hall and *F. W. McGettrick* for the plaintiff.

The administrator should be allowed for his services during the period that his administration was honest. *Farwell v. Steen*, 46 Vt. 678; *Spaulding v. Wakefield's Estate*, 53 Vt. 664; *Barney v. Parsons*, 54 Vt. 623; *McCloskey v. Gleason*, 56 Vt. 282.

Hogan & Royce, *J. Noble Hayes*, and *H. A. Burt* for the defendant.

The administrator misappropriated the funds of the estate. Being thus an unfaithful trustee, he should be allowed nothing for his services. *Spaulding v. Wakefield's Estate*, 53 Vt. 660; *Re Edmund Hodges' Estate*, 66 Vt. 70; *Blake v. Pegram*, 109 Mass. 541; 2 Woerner, Am. Law of Admr., 1163, notes, and cases cited.

The burden was upon the administrator to show that the settlement of the Davis claim was beneficial to the estate. Since the commissioner's report does not show this, he should be charged with it. *Wyman's Appeal*, 13 N. H. 18; *Fridge v. Buhler*, 6 La. An. 272; *Wilks v. Slaughter*, 49 Ark. 235; 2 Woerner, Am. Law of Admr., 684, and cases cited; *Manning v. Purcell*, 7 DeG. M. & G. 55;

Williams' Executors, 1800, 1802; 7 Am. & Eng. Enc. of Law, 285 and cases cited.

Counsel fees upon the hearing before the probate court should not be allowed, for they were occasioned by the fault of the administrator. 2 Woerner, Am. Law of Admr., 1147, 1148; Shoul., Exrs. & Admrs., s. 544.

Compound interest should have been allowed, or at least annual. Shoul., Exrs. & Admrs., s. 538; *Slade v. Slade*, 10 Vt. 195; *Perkins v. Hollister*, 59 Vt. 351; *Barney v. Saunders*, 16 How. 535; *Shieffelin v. Stewart*, 1 John Ch. 620; *Farwell v. Steen*, 46 Vt. 678; *Jennison v. Hapgood*, 10 Pick. 77; *Blake v. Pegram*, 109 Mass. 541; *Thorn v. Garner*, 42 Hun. 507; *Hannals v. Hannals*, 68 N. Y. 610; *Fay v. Howe*, 1 Pick. 527; 2 Woerner, Am. Law of Admr., p. 1138, note, and cases cited; 7 Am. & Eng. Enc. of Law, 429, 430; 2 Kent, Com., (1st Ed.) 188; *McCloskey v. Gleason*, 56 Vt. 264; *Spaulding v. Wakefield's Estate*, 53 Vt. 660; *Walton, Admx., v. Hall's Estate*, 66 Vt. 455; *DePeyster v. Clarkson*, 2 Wend. 77.

TYLER, J. The commissioner reports that George W. Foster died November 1, 1885; that on or about November 15 George B. Foster was appointed special administrator of his estate, and on the 30th he was appointed administrator. George W. had transacted business with two firms of brokers in New York City, one of which at once paid to the special administrator the amount due the estate, four thousand five hundred forty dollars and seventy-nine cents. The other firm refused to pay over unless one Davis, who was an occupant of its office and claimed to have a demand against the estate, was settled with and paid. Davis claimed to have rendered services for George W. in taking charge of his account with the firm, and placing orders with it for the purchase and sale of stocks. Mr. Cross, who was counsel for the special administrator and for Mrs. Foster, widow

of the deceased, examined this claim and the evidence in support of it, was of the opinion that it had merit and should be adjusted, and under his advice it was submitted to the arbitrament and award of two men who were respectively chosen by the special administrator and Davis, and who awarded Davis two thousand four hundred and six dollars of his claim. Two of the heirs in this state approved of the submission, and advised the payment of the award. The brokers paid it by direction of the special administrator, and then paid him the remainder in their hands, six thousand eight hundred thirty-six dollars and fifty cents. It is found that the special administrator and Mr. Cross acted in good faith, and did what they believed was for the interest of the estate in making the settlement. The account of the said George B. was presented to the probate court, December 1, 1885, and was considered, all the heirs of the estate being present or represented. Mrs. Foster was present with her counsel. The Davis claim and the manner of its adjustment were discussed and explained, no objection was made to the allowance and approval of the account as presented, and it was allowed by the court "with the consent or acquiescence of all interested," and no appeal was taken. The defendants claimed that the sum paid to Davis should be charged to the account of the special administrator. The commissioner found that it should not be so charged, unless it was held by the court to be chargeable as matter of law.

It is true, as argued by the defendants' counsel, that it was no part of the duty of the special administrator to pay or compound the debts of the deceased. His duty, as defined by the statute, was to collect and preserve the assets of the estate for the general administrator when he should be appointed, though the statute authorizes a special administrator to commence and maintain suits for the collection of debts. But though he assumed to act outside of the scope of his duty and to settle a claim in another jurisdiction, it

appears that he acted with the knowledge of the heirs, and that the adjustment of the claim had the approval of all the parties interested in the estate when he settled his special administration account. The two thousand four hundred and six dollars had never come into his hands, and if the heirs had desired to stand upon the ground that he had not strict legal authority to make the settlement, they might then have repudiated it, and insisted on the collection of the full amount due from the brokers. Their acquiescence in the settlement and their silence until after the special administrator's decease should estop them from asserting this claim. Williams on Executors, p. 1800, says that though generally speaking an executor, compounding or releasing a debt, must answer for the same, yet if it appears to have been for the benefit of the trust estate, it is an excuse. Other authorities cited on the defendants' brief are to the effect that the release or compromise of a claim by an administrator will not be upheld, if it appears to have been prejudicial to the interests of the estate, or not to have been beneficial to it. But here it must be assumed that all the persons interested adjudged that the settlement was beneficial, and it should be treated as if they themselves had effected it.

The commissioner reports that for the year ending December 1, 1886, the administrator was chargeable with receipts from the special administrator and from other sources to the amount of \$20,009.51, that his disbursements were \$3,410.32, leaving in his hands \$16,599.19. August 10, 1887, the administrator filed an account in the probate court in which he made a charge of \$900 for his services to that date. August 27 he distributed to the heirs about \$20,000, and on December 1, 1887, after the payment of certain debts and expenses, he had remaining in his hands \$2,375.13. Thence until July 24, 1888, he kept the funds of the estate intact, and performed all his duties with fidel-

ity. The commissioner finds that \$900 was "a fair, reasonable and legal charge, as of that date, for services rendered as administrator down to that time." July 24, 1888, he appropriated to his own use \$900 of the funds of the estate, and thereafter at different times prior to his death on July 28, 1893, he had appropriated in all the sum of \$5,429.80, which included the balance of \$2,373.13 in his hands December 1, 1887, and nearly all his net receipts after that date. Some assets that had not been converted into money, and about \$300 found on deposit in banks were taken possession of by the administrator *de bonis non*.

On application to the probate court the administrator was cited to render his account, and in August, 1892, he filed an account supplemental to that rendered in August, 1887, and on December 2, 1892, he filed a further supplemental account. The commissioner found that the estate should have been closed by November 30, 1890, that delay after that date was through the fault of the administrator and that compensation thereafter should be denied him. The administrator charged twelve dollars and fifty cents a month for his services from August 10, 1887, till the filing of his final account. The commissioner allowed the charge per month to November 30, 1890, making four hundred ninety-five dollars and eighty-three cents, and sixty-five dollars for storing the goods of the estate to that date.

The administrator charged in his first account two hundred thirty-three dollars, amount paid as counsel fees, and in his supplemental account further sums amounting to three hundred and twenty-three dollars and ninety-three cents, all which the commissioner found were reasonable and for necessary legal services about the estate, and if proper to find as a matter of fact, that the administrator was entitled to have them allowed. The defendants conceded that the charges were reasonable and proper for the services rendered. It is found that after George B. Foster's de-

cease his executrix, Frances E. Foster, became a party in the accounting before the commissioner; that counsel who had acted for the said George B. then acted for the executrix and rendered services for which they charged one hundred sixty-two dollars, which the commissioner found reasonable and for necessary legal services.

The defendants excepted to the allowance by the commissioner of the nine hundred dollars and four hundred ninety-five dollars and eighty-three cents for the administrator's services, the sixty-five dollars for storage of goods of the estate, all the items for counsel fees and the two thousand four hundred and six dollars for the settlement of the Davis claim. The county court held that the items for the administrator's services and all the items paid counsel for services rendered in the hearings and otherwise in the settlement of the administrator's account in the probate court should be disallowed, but allowed counsel fees for services rendered in collecting the assets, the item for storage and the Davis claim. Both parties excepted to the judgment. The defendants claim that none of the charges for services and counsel fees should be allowed because of the appropriation of funds by the administrator as above stated.

As most of the assets had been collected and distributed by the administrator prior to December 1, 1887, it seems from the report that his services for which four hundred ninety-five dollars and eighty-three cents was allowed were mainly about the funds which he appropriated. As the charge is in gross, and as it does not appear that any part of it was legitimate, it must be disallowed. *Farwell v. Steen*, 46 Vt. 678; *Re Hodges' Estate*, 66 Vt. 70.

The charge of nine hundred dollars for services to August 10, 1887, was properly allowed. The rule that only the faithful trustee is entitled to compensation, applied to this administrator during this period. The funds had been kept intact, and no claim is made that the services were not ben-

eficial and the charges reasonable. The items of thirty-two dollars and two hundred dollars for attorneys' fees stand upon the same ground. It is within the rule given in Williams on Executors, that an executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office except those which arise from his own fault. *Shaw v. Bates*, 53 Vt. 360.

In *Jennison v. Hapgood*, 10 Pick. 77, it was alleged that the executor had come into possession of assets for which he had never accounted, that his account rendered contained gross errors, and that fraud had been practiced by him in stating and settling his account in the probate court. Upon an issue joined, the jury found that the executor's accounts were fraudulent, and that the several decrees of the probate court allowing them "were obtained by the false affirmations and oaths of the executor and not honestly and in good faith." The Supreme Court said: "The appellants contend that no compensation ought to be allowed because the appellee has been found guilty of unfaithful administration. This consideration, however, ought not to be blended with the claim for compensation, so far as the services of the appellee have been beneficial to the heirs." In the notes to Williams on Executors, p. 1853, the same rule is stated with the qualification that compensation will be denied where the administrator's wilful default or gross negligence has occasioned loss to the estate. This is illustrated in *Brennan's Estate*, 65 Pa. St. 16, where the administrator wrongfully gave up a promissory note of the value of five hundred dollars so that it was lost to the estate. His commission of four hundred eighty-four dollars was denied him.

In 2 Woerner's Law of Admin., s. 526, the rule is laid down that compensation must be refused if the administrator has been guilty of wilful default or gross negligence in the management of the estate whereby it has suffered loss. This is deduced from the cases cited by the author in the

notes and applies where there has been a general mismanagement of the estate. In the same section he says that to the extent to which the estate has been properly administered and on the amounts which the administrator or his sureties pay to make up for the losses by devastavit or maladministration, the administrator should be allowed such commission as the statute provides—when the statute fixes the compensation—and cites *Jennison v. Hapgood* among other cases.

The subsequent items for attorneys' fees, amounting to three hundred twenty-three dollars and ninety-three cents, were for services rendered to the administrator from December 1, 1892, to July 28, 1893, and should be disallowed but for the finding that the charges were reasonable, that the services rendered to the administrator were necessary for a proper accounting, and that the necessity was not created by the administrator's delay in settling the estate, nor by his appropriation of the funds. "The accounting related to a wide variety of matters of considerable intricacy, to transactions with reference to property in different parts of the western states, to the history of different suits and causes of litigation and to the transactions with reference to the Davis claim." Upon the finding this item should be allowed.

The report lacks this express finding in respect to the legal services rendered to George B. Foster's executrix, but it is found that the charges were reasonable, "and that the services rendered were necessary to the executrix in the accounting." It was her duty to finish the accounting, and the one hundred sixty-two dollars should be allowed.

The commissioner found that the charge of fifteen dollars a year for the storage of goods was reasonable and proper. It had no connection with the administrator's wrong doing and should be allowed.

Hill on Trustees, p. 522 *et seq.*, says that the court will endeavor as far as possible to replace the parties

in the same situation as they would have been if no breach of trust had been committed. Where the property has been improperly disposed of and can be followed *in specie* the trustee will be compelled to reconvey it for the purposes of the trust. In taking the account against the trustee, he will be charged with the amount of principal and income, which might have been received from the trust estate if no breach of trust had been committed. Where a strong case of corrupt or improper conduct is established against the trustee, or if he has acted in direct contravention of an express trust to accumulate, he will be charged in addition to the usual rate of interest with annual or half yearly rests, in the nature of compound interest. In *Farwell v. Steen* the guardian received some securities bearing annual interest and some simple interest, converted them into money, mingled it with his own and invested the commingled funds where he received more than six per cent interest; *held* that he was chargeable with annual interest on the whole trust fund, and was disallowed compensation. *Shaw v. Bates*. The subject of interest on appropriated funds is well discussed by Walker, J., in *Perkins v. Hollister*, 59 Vt. 348. In *McCloskey v. Gleason*, 56 Vt. 264, the court said:

"Instead of relaxing the rule charging the trustee who so intermingles the trust estate with his own that he cannot tell what property belongs to the estate, nor what gains he is making thereon—with the highest legal rate of interest, and allowing him nothing for his services, it should be made more stringent." *Schouler on Exrs. and Admrs.*, s. 538.

Upon the facts disclosed there is no occasion to apply a different rule in the present case from the one adopted by this court in the cases above cited.

The general debit balance when George B. Foster died July 28, 1893, was five thousand seven hundred twenty-two dollars and forty-six cents. Deducting two hundred ninety-two dollars and sixty-six cents, the amount found in

banks, leaves five thousand four hundred twenty-nine dollars and eighty cents, which is the aggregate of the appropriations.

The several sums appropriated, are chargeable to George B. Foster's estate, with annual interest from their dates to the first day of this term. As the account is stated, the item of four hundred ninety-five dollars and eighty-three cents was an appropriation and must be charged at the same rate of interest, making in all seven thousand five hundred five dollars and sixty-seven cents, from which should be deducted one hundred sixty-two dollars, allowed the executrix for counsel fees, and interest.

Judgment reversed and judgment that the plaintiff account for seven thousand three hundred thirty-four dollars, to be certified to the Probate Court.

CUTLER & BURNHAM

v.

SOPHIA A. DIX.

OCTOBER TERM, 1894.

Construction of written contract is for the court.

The plaintiffs contracted to furnish a monument of a certain design and of given dimensions. It was conceded that the dimensions of the monument built were different from those called for by the contract. *Held*, that the court should have ruled as matter of law that the plaintiffs were not entitled to recover, and that it was error to submit to the jury whether the dimensions used were necessary to give due proportion to the specified design.

Assumpsit. Plea, the general issue. Trial by jury at the March term, 1894, Washington County, Tyler, J., presiding. Verdict and judgment for the plaintiffs. The defendant excepts.

John W. Gordon and *John H. Senter* for the defendant.

The construction of this written contract was for the court, and it was error to submit to the jury whether the conceded change in dimensions was a departure from its terms. *Denison's Ex. v. Wertz*, 7 Sar. & R. 371; *Dwight v. Germania Ins. Co.*, 103 N. Y. 347; *Barby v. Cassidy*, 104 N. Y., 155; *Rogers v. Colt*, 21 N. J. L. 711; *Wasson v. Rowe*, 16 Vt. 528; *Gove v. Downer*, 59 Vt. 139; *Perry v.*

Smith, 22 Vt. 309; *Holmes v. Samuel*, 15 Ill. 412; *Lawson, Usa. & Cus.*, s. 211; *Beals v. Terry*, 2 Sandf., 127; *Vial v. Hubbard*, 37 Vt. 114.

S. C. Shurtleff and *O. B. Boyce* for the plaintiff.

The design was as much a part of the contract as the dimensions and the plaintiffs might well follow it in constructing the monument. *Smith v. Wilson*, 3 B. & Ad. 728; *Grant v. Maddox*, 15 M. & W. 737; *Jolly v. Young*, 1 Est. N. P. C. 186; *Robertson v. Jackson*, 2 C. B. 412.

TAFT, J. The plaintiffs agreed in writing to furnish the defendant a monument according to the Dickenson design (except the corner on the die) and of certain specified dimensions. They furnished one, the various parts of which were not cut according to the sizes specified in the contract. Nine of the fifteen measurements varied from those specified. In the monument furnished, the plinth was four and seven-eighths inches longer, and the cap three and three-fourths inches thicker, than the dimensions required by the agreement. This change of sizes was made by the plaintiffs without the knowledge or consent of the defendant. In reference to this question of the changes in the dimensions of the monument, it is stated in the exceptions that the plaintiffs and their witnesses were allowed to testify what they thought the sizes of the monument ought to be and the effect that the variations made from the contract sizes had upon the proportions of the monument. We infer, although it is not so stated, that the variations from the measurements which the parol evidence tended to show and which were conceded by the plaintiffs to have been made, were so made in order to make the monument conform to the Dickenson design. The court submitted to the jury the question whether the variations shown were a departure from the contract. The evidence in regard to the variations was

admitted under exception and the defendant also excepted to the submission to the jury of the construction of the contract, claiming that it was a question for the court. Had it been uncertain what the dimensions of the monument were, there might have been a question to submit to the jury, but what the dimensions were, was conceded, and it was a question for the court to say whether the monument was a compliance with the contract. Had the plaintiffs a right to change the dimensions of the monument and make them other than the prescribed ones? We think not. The fact that the monument was to be of a certain design did not justify the plaintiffs in constructing it with other dimensions than those specified in the contract. The design must yield to the measurements. The case is analogous to a conveyance of land which is described by metes and bounds, or courses and distances, and it is held that such description prevails over any general description of the subject matter that may have been used in the deed, tending to enlarge or diminish the boundaries. While many of the variations were so slight that essentially they were such as the contract called for, there were others that we must hold were a substantial departure from the contract; thus the plinth was more than twelve per cent longer and the cap more than twenty-eight per cent thicker than the contract dimensions. It can not well be said that the contract presents a case of latent ambiguity, for the measurements prevail over the design and thus there is no uncertainty. The dimensions must govern and they are made certain. If the contract was erroneously drawn its reformation cannot be had in a court of law. The dimensions of the monument furnished being conceded, it became a question of law whether the contract was complied with. It does not appear that there was any difficulty in constructing a monument according to the specified measurements and the defendant was entitled to a compliance with the contract. Under this holding the defendant was under no obligation to

accept the monument and to pay the consideration named in the agreement. The other questions which arose upon the trial become immaterial and it is unnecessary to consider them.

Judgment reversed and cause remanded.

ROSS, C. J., dissents.

I concur in the result, but not in the grounds of the decision. I think that all of the terms of the contract are to be considered, in ascertaining the intention of the parties. On the face of the contract there is discoverable no contradiction nor ambiguity between the Dickenson design and the measurements. But, on applying this design and the measurements to a monument it is found they do not agree, and a doubt or ambiguity arises in regard to which the parties intended should control. I think parol testimony was admissible to remove this latent ambiguity. But the court erroneously rejected testimony to show what the several measurements of the Dickenson monument were, which had been made in accordance with the Dickenson design. I do not think that the measurements are to control, and that the design with its proper proportions is to be rejected. But when a substantial variance between the design and the measurements is shown, then the ambiguity may be cleared up by parol testimony, that the intention of the parties may prevail.

RE J. J. ENRIGHT.

JANUARY TERM, 1895.

Disbarment of attorney. Construction of report.

1. Where a committee of two, appointed to report the facts upon proceedings for disbarment, agree as to the facts but disagree as to the conclusion to be drawn from those facts, that aspect of the report most favorable to the attorney on trial will be adopted.
2. It is cause for disbarment, if an attorney, who, as an executor, is a co-plaintiff in a suit, represents to the opposing attorney that he has knowledge of certain facts, which will be an absolute defence to the suit, and which he offers to impart for the payment of a sum of money, although such representations are false and were made to induce a settlement of the suit.

Proceedings for disbarment. Heard upon the report of a committee. The opinion states the facts.

J. L. Cushman for prosecution.

W. L. Burnap and *Henry Ballard* for Enright.

PER CURIAM. Mr. Enright is a duly admitted and sworn attorney of this court and under the law by virtue thereof, entitled to practice in the other courts of the state. As such attorney, he brought a suit in favor of Matthew Bingham against the Phoenix Insurance Company, of New York. Mr. E. R. Hard was the attorney for the insurance company, and Mr. U. C. Crosby its agent. Subsequently Mr. Bingham died, and Mr. Enright and Mr. Dodds were

duly appointed executors of Mr. Bingham's will, and as such entered to prosecute the suit. Mr. Enright continued to act as attorney for the plaintiffs, but, some disagreement having arisen between Mr. Enright and Mr. Dodds, the latter employed another attorney to appear and act for him. On the trial of this suit, at the April term of Chittenden County Court, 1894, evidence was given that Mr. Enright, before the trial, had approached Mr. Hard and told him that the Bingham estate was owing him considerable, and that if Mr. Hard could influence the company to pay his claim, or four hundred dollars, he would impart to him information which would be absolutely sure to insure the defence in that case. Evidence was also given that, on another occasion, before the trial, Mr. Enright had an interview with Mr. Crosby, and told him that he was tired and disgusted with the case, and that Mr. Dodds, his co-executor, was a rascal, that he had got more or less money in it; and that he had in his possession facts which if placed in the possession of the company would make the defence of the suit absolute, and if he could be remunerated he would put Mr. Crosby in possession of such facts. Knowledge that such testimony had been given having come to this court, the court, of its own motion, filed an order directing the state's attorney of Chittenden County to file charges of unprofessional conduct against Mr. Enright, stating therein the matters which had appeared in evidence on the trial, and calling upon Mr. Enright to make answer to the charges so made. Mr. Enright filed his answer, specifically and generally, denying the charges. This court referred the matter, for hearing, and for the determination of the truth of the charges, to two members of the bar of the state, and prominent members of the bar association. This committee having fully heard the state's attorney, Mr. Enright and their respective witnesses, in respect to such charges, have reported that they find that Mr. Enright, while the suit against the insur-

ance company, in which he was one of the plaintiffs, as executor of Mr. Bingham's will, and attorney, was pending, did in substance make the proposition set forth in the charges to Mr. Hard, as the attorney of the insurance company, and to Mr. Crosby, its agent. The committee do not find that Mr. Enright had knowledge of any such facts as would make an absolute defence for the insurance company; and report that there was no evidence before them, except his statements to Mr. Hard and to Mr. Crosby, that he had knowledge of any such facts. They, in substance, find that these statements of Mr. Enright, that he had knowledge of such facts, are not to be credited; and find that he is not guilty of knowingly suing or prosecuting a false or unlawful suit. One of the committee, from the facts and circumstances, infers and finds that these offers were made by Mr. Enright with the corrupt intention of benefitting himself, at the expense of the estate of which he was then executor, and in violation of his oath as an attorney. The committee find that the estate of Mr. Bingham was small and insufficient to pay much, if anything, on the claims against it, or the expenses of administration, unless something was realized out of the suit against the insurance company, and that Mr. Enright's claim against it amounted to two hundred ten dollars. Mr. Dodds also had a claim against the estate. Both were anxious to procure a settlement of the suit against the insurance company. The other committee fails to find that Mr. Enright had any corrupt motive in having these interviews and making the offers, "but infers that what Mr. Enright said was but an attempt to draw out something from the other party looking towards the settlement of the suit, and failing in this the whole subject matter was dropped." This committee was selected because the court knew that they were fair minded, careful men, who had had a large experience in the trial of cases. This court, however much any one of its members might think

that the facts and circumstances found by both of the committee support the inference of one of the committee, and fail to support the inference of the other, feels bound to rest its judgment upon the inference most favorable to Mr. Enright. A judgment of disbarment is a serious matter to Mr. Enright. It removes him from the practice of his chosen profession. It has cost him considerable money, and several years time to prepare himself for such practice. It also leaves a stain upon his character. We are fully mindful of its grave consequences to him. We are also mindful that by admitting him to the bar, and allowing him to practice law in the courts of the state, the court held him out to the community as worthy of confidence, as a man of integrity and honesty, to whom all could safely confide, and entrust their rights to property, liberty and life. The statute and rules formulated by its authority require that before this court can admit to the practice of the law any one, it must be satisfied, not only that he has acquired a creditable knowledge of the principles of the law, of their application, and of the practice of the courts, but also, that he sustains a good moral character. He must also take a solemn oath that he will do no falsehood, nor consent that any be done in court, and if he should know of any, he will give knowledge thereof to the judges of the court, or some of them, that it may be reformed; that he will not wittingly, willingly, or knowingly sue, or procure to be sued any false, or unlawful suit, or give aid or consent to the same; that he will delay no man for lucre or malice, but will act in the office of attorney within the court, according to his best learning and discretion, with all good fidelity, as well to the court as to his client. This is the rule of his conduct in the practice of his profession. He places himself under the most solemn obligation known to the law to obey and be ruled by it. On the most favorable inference, in a pending suit, in which he was both party and attorney, on one occasion he approached

the attorney, and on another the agent of the other party, with a falsehood, pretended to have knowledge of facts which he did not possess, offered to sell it for a price, to induce an offer of settlement, which would not otherwise be made. This was done with reference to a suit then pending in court, and to secure an unfair and fraudulent settlement of it. It was a plain violation of his oath and of his duty, when considered in its most favorable light. All decisions and authorities concur in holding that it is the right and duty of the court, when an attorney is found guilty of corrupt or fraudulent acts, performed in his office of attorney, to withdraw the right and privilege which were conferred by admitting him to the bar of the courts of the state. *Delanas Case*, 58 N. H. 5; *Barker's Case*, 49 N. H. 195; *Bryant's Case*, 24 N. H. 149; *State v. Kirke*, 12 Fla. 278 (95 Am. Dec. 314) and extended note.

Judgment that Mr. Enright is removed from the office of attorney at law and from the office of solicitor in chancery.

Taft, J., excused himself from acting, as the matter arose in the county where he resides.

W. H. SARGENT ET UX.

v.

S. H. KING.

OCTOBER TERM, 1894.

*Construction of contract to convey land. Application
of payments.*

Plaintiffs contracted to sell defendant a farm for twelve hundred dollars; and by the same writing leased it to him for one hundred dollars a year, with the agreement that when he had paid five hundred dollars and interest they would convey and take a mortgage for the balance. It was further agreed that the defendant might cut wood and timber provided the proceeds were applied on the purchase price. *Held*, that the proceeds of such wood and timber could not be applied to the payment of the annual rent as it fell due.

Covenant broken. Plea, the general issue. Trial by court at the May term, 1894, Windsor County, THOMPSON, J., presiding. Upon the facts found by the court judgment was rendered for the plaintiffs to recover the sum of one hundred seventeen dollars thirty-two cents and their costs. The defendant excepts.

February 2, 1892, the plaintiffs and defendant, by writing under seal, entered into an agreement whereby the plaintiffs contracted to sell their farm to the defendant for the sum of twelve hundred dollars, and to lease it to him, giving him possession forthwith, for the sum of one hundred dollars per year; and the defendant upon his part agreed to pay the

said rent of one hundred dollars per year and the taxes upon said farm. It was provided that whenever the defendant had paid five hundred dollars and interest on the entire sum the plaintiffs should convey the premises, taking back a mortgage for the balance due upon the purchase money.

It was also provided that the defendant might cut wood and lumber upon the premises provided that the avails were to be applied upon the purchase price.

The defendant entered into the possession of the premises immediately after the execution of the indenture and continued to occupy the same. He did not pay any part of the rent for the year 1892, unless the avails of the wood and lumber hereafter mentioned should be applied thereon. In the winter of 1892-3 he cut certain wood and timber upon the premises, and on February 23, 1893, he paid to the plaintiffs the sum of ninety-six dollars and twenty-one cents, being the avails from such wood and lumber, and received from them a receipt specifying that the amount was applied on the purchase money of the farm.

The court found that the rent for the first year and interest up to the date of the trial amounted to one hundred nine dollars and eighty cents, and that the plaintiffs had also been obliged to pay certain taxes upon the premises, which, with interest, amounted to seven dollars and fifty-two cents.

The defendant claimed that the avails of the wood and lumber should be applied in payment of these amounts, but the court held otherwise, and gave judgment accordingly.

N. L. Boyden and J. D. Denison for the defendant.

J. J. Wilson for the plaintiffs.

TYLER, J. By the contract the plaintiffs agreed to sell and convey the farm to the defendant for twelve hundred dollars. By the same writing they leased it to him for an annual rent of one hundred dollars with permission to enter

upon and occupy it so long as he performed his part of the conditions. It further provided that when he had paid five hundred dollars in annual rent, with annual interest from the date of the contract, the rent so paid should be applied on the contract price, and the plaintiffs should then convey the farm to him, he giving them his note secured by mortgage for the remaining seven hundred dollars. The defendant might also cut wood and timber on the farm, provided he applied the avails thereof in payment of the twelve hundred dollars. To this end the plaintiffs were to have a lien on all wood and timber so cut. The defendant also gave a lien to the plaintiffs on all his annual crops as security for the payment of the rent. He agreed to use and improve the premises in a husband-like manner, keep the buildings in repair and keep them insured for the plaintiffs' benefit, pay the taxes, and in default, to surrender the premises and all his rights to the same to the plaintiffs. These were stipulations contained in the contract.

The defendant's counsel contend that the avails of wood and timber stood precisely like the five hundred dollars paid as rent; that both were to be reckoned as payments towards the contract price of the farm, and therefore that the ninety-six dollars and twenty-one cents received from the sale of wood and lumber and paid over to the plaintiffs, and the thirty-seven dollars and fifty cents worth of wood which the plaintiffs took and applied to their own use, more than paid the rent and taxes that were due when the suit was bought. This contention cannot be maintained for the reason that the annual rent was not to be treated as a payment on the twelve hundred dollars until it amounted to five hundred dollars. If the defendant had paid his rent for any number of years less than five and then ceased payment, he could not have claimed that the amount then paid should be applied on the twelve hundred dollars. It was not until rent had been paid for five years and to the amount of five hundred dollars,

and annual interest had been paid on the five hundred dollars, that it was to be applied on the contract price.

It was in this view that the court below held that the ninety-six dollars and twenty-one cents could not be applied in payment of the overdue rent. It could not have held otherwise when it was found that it was understood by the parties that it should be applied on the contract price of the farm, and that the defendant took a receipt from the plaintiffs specifying that it was to be so applied. Therefore this sum and the thirty-seven dollars and fifty cents will be applicable on the seven hundred dollars at the termination of the five years' lease, provided the defendant has performed his part of the contract.

Judgment affirmed.

C. A. PADDOCK ET AL.

v.

A. H. POTTER ET AL.

JANUARY TERM, 1895.

*Competency of witness. Death of party. Construction
of deed. Undelivered deed.*

1. If a mortgage is executed to two mortgagees jointly, although to secure their separate debts, the contract is between them jointly on the one part and the mortgagor upon the other and the death of one mortgagee will not render the mortgagor incompetent as a witness.
2. A conveyance of "any interest that we or either of us may have in any other real estate" will not carry an after acquired interest.
3. The mere execution of an undelivered deed does not convey an interest in the premises to a grantee who has no legal right to demand a conveyance, and if the deed is subsequently delivered the grantee's title will date from the delivery.

Petition of foreclosure. Heard upon the report of a special master at the June term, 1894, Bennington County. TAFT, chancellor, decreed foreclosure as to all the pieces sought to be foreclosed except the sixth, and dismissed the petition as to that. The petitioners appeal.

April 2, 1889, the defendants, A. H. Potter and wife, executed to the orator, Bates, and the testate of the orator, Paddock, the mortgage which it was sought to foreclose.

The mortgage describes specifically five different parcels of land, and no question was made by the defendant but what the orators were entitled to foreclosure in respect to these parcels.

The mortgage also contained this clause: "And we further hereby convey any and all other real estate in the town of Pownal that we, or either of us, own or possess, or any interest that we, or either of us, may have in any other real estate in said Pownal." Under this clause the orators claimed foreclosure of four other parcels not specifically described. As to the seventh, eight and ninth parcels no serious question was made by the defendants, the dispute being upon the sixth, as to which the facts were these.

March 9, 1884, one Sarah E. Lincoln executed and acknowledged, in due form, a deed of certain land in the town of Pownal to the defendant, A. H. Potter, being said sixth parcel. By the terms of this deed Mrs. Lincoln reserved to herself the use of the premises during her life time. The deed was not delivered by her to the defendant Potter until about October 13th, 1891. It was at once taken by him to the town clerk of Pownal and recorded. Mrs. Lincoln deceased in 1892 and before the commencement of this suit.

The premises were conveyed to Mrs. Lincoln by defendant Potter and his brother E. A. Potter upon the same day that she executed the deed in question. At that time there was a dwelling-house upon the land nearly completed, and the master found that the conveyance from Potter and his brother was in pursuance of an agreement to do so if she erected the house; that the value of the land before the erection of the house was from two hundred to three hundred dollars and of the house five thousand dollars; that there was no consideration for the conveyance to Mrs. Lincoln, who was the mother of defendant Potter's first wife, except the hope that it might result in benefit to him; that he had no legal

right to demand a conveyance from her, but that there was always an expectation upon his part that she would make the conveyance as she did, and that he had expended considerable labor upon the premises without compensation upon the strength of this expectation.

The mortgage was given to Ichabod F. Paddock and Daniel F. Bates, jointly, and was conditioned for the payment to the said Paddock of two promissory notes for the sum of two thousand one hundred dollars, and for the payment to the said Bates of two other promissory notes for the like sum of two thousand one hundred dollars. Upon the trial before the master the defendant, A. H. Potter, was offered as a witness. The orators objected that his testimony was incompetent, for the reason that the said Ichabod F. Paddock had deceased. The testimony was received by the master, subject to this objection and exception, and the orators excepted to the master's report upon that ground.

W. B. Sheldon for the orators.

Since the delivery of the deed from Mrs. Lincoln to A. H. Potter was made in pursuance of a previous expectation, it should relate back to the date of the deed itself. *Bell v. Farmers' Bank of Ky.*, 21 Am. Rep. 205; *Jones v. Jones*, 16 Am. Dec. 40; *Tallman v. Cooke*, 39 Ia. 402; *Shirley v. Ayres*, 45 Am. Dec. 547; *Mather v. Corliss*, 103 Mass. 568; *Foster et ux. v. Mansfield*, 44 Mass. 412.

The mortgage would convey after acquired land. *Rauch v. Dech*, 116 Penn. St. 157; *Reynolds v. Cook*, 83 Va. 817, (5 Am. St. Rep. 317); *Jarvis v. Aiken*, 25 Vt. 639; *White v. Patten*, 24 Pick. 324.

Waterman, Martin & Hitt for the defendants.

The testimony of Potter was admissible. The mortgage was given jointly to Paddock and Bates, and Bates, the

survivor, is a party to this suit. *Dawson v. Waite*, 41 Vt. 626; *Bradish v. Belknap*, 46 Vt. 1.

The deed of Mrs. Lincoln was inoperative until it was delivered. 1 Perry Trusts, s. 99; *Elinore v. Marks*, 39 Vt. 538.

ROWELL, J. Although the mortgage secured only the several debts of the mortgagees, yet it was executed to them jointly, and therefore they together were the party thereto of the one part and the mortgagors of the other part; hence the death of one of the mortgagees did not render the mortgagor Potter incompetent to testify concerning the scope of the mortgage in respect of what land it embraced, as the other mortgagee was living and competent to testify.

After specifically describing five pieces of land, the mortgage contains these words: "And we further hereby convey any and all other real estate in the town of Pownal that we or either of us own or possess, or any interest that we or either of us may have in any other real estate in said Pownal."

The petitioners claim that at the time of the execution of the mortgage, the mortgagor Augustus H. Potter had an interest in the piece of land called in the case the sixth parcel that passed under those general words of the mortgage; but if not an interest then, that those words are broad enough to embrace an after-acquired interest therein, and that he acquired such interest, which, when it accrued, fed the estoppel and passed it at once under the mortgage, as it contains full covenants of warranty.

But we construe those words to embrace only a then present interest and not an after-acquired interest. The words "may have," as there used, mean, may now have, and not, may hereafter have. This is clear from the context. This construction disposes of the claim of title by estoppel, and leaves for consideration only whether Potter had an interest

in that parcel when the mortgage was given, which depends upon whether the deed from Mrs. Lincoln to him, executed long before the mortgage was given, conveyed title to him before it was delivered. The facts concerning that deed are these: Potter and his brother owned a lot of land worth two hundred or three hundred dollars; under an oral agreement to convey it to her, Mrs. Lincoln, the mother of Potter's first wife, erected an expensive house thereon, in the building of which Potter labored without compensation; after it was built, he and his brother conveyed the land to Mrs. Lincoln as agreed, and she at the same time executed to Potter a quit-claim deed of the premises with certain conditions, but kept the deed in her possession and control till October 15, 1891, long after the mortgage was given, when, thinking her end near, she delivered it to him and it was recorded. There was no understanding when Potter and his brother deeded to Mrs. Lincoln that she should reconvey to him, and he never considered that he had any legal interest in the premises; but although Potter was not entitled to demand a deed, yet there was an expectation that she would reconvey to him and that her affection for him would enure to his benefit. The only consideration moving to Potter's brother for deeding to Mrs. Lincoln was the benefit Potter might derive therefrom.

Many claims are put forth in argument as affording ground for holding that this deed conveyed a present interest to Potter that passed under the mortgage; but a careful consideration of them fails to disclose such ground, and mainly because the facts found do not warrant the claims. Upon the findings, this deed was subject to the absolute control of Mrs. Lincoln till its delivery; there was no secret trust in the matter, and she could have destroyed the deed at any time and conveyed the premises to whomsoever else she pleased, and Potter would have had no legal ground of complaint. In these circumstances the deed evidently

passed no title till delivery, and then, for present purposes, as of that date, and not by relation as of the date of the deed.

The defendants claim that the seventh and the ninth parcels did not pass under the mortgage, but the question is not pressed at all, as well it may not be, for no such defence is made by the answer, but on the contrary the answer pretty much says that no question is made about it.

Decree affirmed and cause remanded. Let the Court of Chancery fix the time of redemption.

STATE v. W. M. GORHAM.

OCTOBER TERM, 1894.

Confession. Admissibility for the court. Cross-examination. Charge of Court. Error.

1. A confession is admissible, if voluntary, although made while the prisoner is in irons, without counsel, and expecting to die from the effects of poison.
2. Whether a confession is voluntary and therefore admissible is a preliminary question for the trial court.
3. Upon the determination of this preliminary question the trial court can only consider the evidence introduced, and if, after the confession has been admitted, testimony is introduced to the jury bearing upon its admissibility, the court should not thereupon change its previous ruling, at least unless requested.

4. The respondent had no right to inquire, upon the cross-examination of the officer who arrested him, whether he regarded as suspicious certain circumstances to which he had testified in chief, he not having indicated by his conduct or testimony that he so regarded them.
5. Where, upon the facts, the prisoner is guilty upon both counts if upon either, it is no error for the court to tell the jury that if they find him guilty upon the first count they probably will upon the other.
6. The court may assume as true in its charge facts which are conceded, and this includes facts which, although in dispute at first, have come to be conceded in the course of the trial.
7. The prisoner admitted that he made the confession, but said it was false. At the time he made it he had no knowledge of the evidence of the prosecution against him. The court instructed the jury that they might inquire whether the respondent would have been likely to concoct a story at that time which would have so exactly fitted the surrounding circumstances. *Held*, no error, it not appearing that the existence of the "surrounding circumstances" was in dispute.
8. The jury came in disagreed, but without asking for additional instructions. The court thereupon gave them an additional instruction, which was proper if they had been properly instructed upon that subject before. *Held*, no error.
9. *Held*, that what the court said about the expense of the trial, in returning the jury to a further consideration of the case, was intended to reconcile them to their duty, and not to promote an agreement, and therefore not error.

Indictment for arson in four counts. Plea, not guilty. Trial by jury at the June term, 1894, Orange county, Ross, C. J., presiding. Verdict guilty. The respondent excepts.

R. M. Harvey and *J. K. Darling* for the respondent.

The confession was not voluntary, and should not have been admitted. *State v. Day*, 55 Vt. 510; *State v. Walker*, 34 Vt. 296; *State v. Phelps*, 11 Vt. 116.

His physical condition was such as would render it inadmissible. *Vaughn v. Commonwealth*, 17 Gratt. (Va.) 576;

People v. Ah How, 34 Cal. 218; *State v. York*, 37 N. H. 175; *State v. George*, 15 La. Ann. 145; *Com. v. Curtis*, 97 Mass. 574; *McGlothlin v. State*, 2 Coldw. (Tenn.) 223.

George L. Stowe, State's Attorney, for the State.

It was for the county court to determine whether the confession was admissible. *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 Vt. 296.

ROWELL, J. The prisoner's confession to Mrs. Parish was made when he was shackled and in custody, without counsel, and expecting to die from the effects of poison taken after his arrest. Testimony was introduced by both sides on the preliminary inquiry whether the confession was voluntary or whether Mrs. Parish held out inducements to the prisoner and thereby obtained it. The court found that the confession was made of the prisoner's own motion, without any inducement, and admitted it in evidence. The prisoner excepted to its admission, and especially because it was made when he was without counsel, and also excepted to the court's determining from the testimony whether it was voluntary or obtained by inducements, and to be admitted or rejected accordingly.

It will be seen from the cases cited in the note to *Daniels v. State*, 6 Am. St. Rep. 243, and from *State v. Patterson*, 73 Mo. 695, 707, and *Jackson & Dean v. State*, 69 Ala. 249, that none of the circumstances in which the confession was made, it being voluntary, rendered it inadmissible. In the case last cited, confessions were admitted that were made while the accused were in prison, to an officer in authority, in the absence of friends and counsel, it appearing that no threats nor promises were made. There are some cases to the contrary, but we are not inclined to follow them, as we regard them opposed to the weight of authority and to the reason of the thing. But of course the circum-

stances in which a confession is made are always to be considered in determining its weight as evidence, although they do not make it incompetent testimony.

It is for the trial court and not for the jury to say whether a confession is admissible or not; and if the testimony on that preliminary inquiry is conflicting, the decision of that court is final; but if not conflicting, its decision admitting the confession is revisable here. This is not denied; but it is strenuously claimed that this case comes within the latter part of this rule, for that the undisputed testimony of the witness Hyzer shows that he had a talk with the prisoner just before he confessed to Mrs. Parish, wherein he told the prisoner that if he did it, it would be very much better for him to make a clean breast of it. This point was argued by both sides as though Hyzer testified on the preliminary inquiry, whereas the fact is, as shown by the testimony, that he did not testify on such inquiry, nor testify at all until he was called by the prisoner when putting in his testimony on the main case, and the prisoner's testimony does not show that he claimed to have been influenced in the least by what Hyzer said to him. Besides, it does not appear that the court was asked when Hyzer's testimony came in to then exclude the confession, nor to take any other action in view of his testimony. It appears, therefore, that the matter of Hyzer's testimony on this point affords no ground for the argument based upon it.

On cross-examination of the officer who arrested the prisoner and who hoped for the rewards that had been offered, the prisoner's counsel were not permitted to ask the witness whether he thought certain things to which he had testified, mostly in chief, were suspicious circumstances. It does not appear that the witness had testified to having had his suspicions aroused, nor to having done anything by reason of his suspicions, nor that he characterized as suspicious anything to which he had testified, but rather the contrary ap-

pears. The matter falls, therefore, within the rule that a witness is not to give his opinion nor to characterize his testimony, because it is irrelevant.

The court told the jury that if one purposely burns his own buildings or the buildings of another, designing it to be shown to be an accidental fire and the insurer made to pay the loss, he intends to defraud the insurer. It then went on to say that if they found the prisoner guilty under the first count, which was for burning the barn and outbuildings, they would probably be pretty likely to find him guilty under the fourth count also, which was for burning said buildings with intent to defraud the insurance company. To this last statement the prisoner excepted, but it was not error. It can scarcely be conceived that the jury would not do that; but it was left wholly to them to say whether they would or not.

The testimony tended to show that the prisoner had tried to sell the farm and personal property to two or more persons, and he admitted on the stand that he had tried to sell it to two of those persons. The court told the jury that there seemed to be no controversy but that the prisoner, at the time in question, was anxious to dispose of the property; to which he excepted. While the court should not in its charge assume as true matters that are in dispute, yet it may assume as true matters that are not in dispute, or matters that were at first in dispute but in the course of the trial have come not to be in dispute, but to be tacitly or otherwise treated as true by both sides, and the case thereafter tried on that theory. When a change of this kind takes place, as often happens, the court may treat the case in this regard as the parties have treated it, and charge accordingly. It does not appear that the court did more than that in this case. Indeed, it is to be assumed that what the court said in this regard was true, it not appearing to be untrue.

The testimony is not made a part of the exceptions on this point.

The prisoner admitted on the stand that he made the confession testified to by the witnesses on the part of the state, but said it was all false. At the time he made the confession there had been no examination before the magistrate, and it did not appear that he knew what evidence the state claimed to have against him. The court told the jury that when considering the confession they had a right to say whether it was probable that at that time the prisoner, in his condition and prospects, would have gotten up and concocted a false story that would fit right into all the surrounding circumstances as this one did—whether he could in that short time have concocted this story and had it fit into the burning, to hearing the team go by, going to bed and staying till his sister called him up, spilling the kerosene oil, carrying off his clothes, making tracks, and all those things, just what they found he did say, and yet it all be false. The prisoner excepted to this, and says that the “surrounding circumstances” were neither admitted nor agreed upon, and that therefore the court could not say that the confession fitted into them. This criticism might have force if it appeared that the circumstances alluded to by the court were not, practically, undisputed; but as it does not thus appear, it is without force.

The jury, after being out all night, came in disagreed, but wanted no further instructions. The court, however, said to them that they had some occasion to inquire whether there might not possibly have been some other party around there, but that that was not the question to be tried; that the only question to be tried was, whether the fire was a criminal fire and the prisoner the criminal; that the other question that there was some suggestion of by some of the testimony had not been investigated and could not be investigated, except to say that it showed that it

might be probable or possible that it was a criminal fire and someone else had to do with it.

If this amounted to charging the element of another's guilt out of the case, or if there is fair ground for thinking that the jury may have so understood it, it would be error. But it is considered by a majority of the court that it did not amount to that, and that there is no fair ground for saying that the jury may have thought it did. It is to be presumed that proper instructions had been given on this point before; and this additional instruction put the matter in its true light when it said that the scope of that inquiry was, if the fire was criminal, whether someone else had to do with it. It was not necessary for the jury to be told in order to know that the more the testimony showed against another the less it showed against the prisoner; but if it was necessary it is to be presumed that they had already been told that. There was no error here.

The court returned the jury for further consideration, and in doing so said to them, lest they should think its action unreasonable, that the trial had occupied five days; that the testimony was lengthy, covered a good many points, had been fully discussed, and could be looked at in many different lights; that it was important to the prisoner and to the state that the case should be determined; that it had been quite expensive to the state, and that that expense ought not to be thrown away if it could be avoided; that the court had to have these considerations in mind when a jury asked to be discharged, and that the court thought the jury should have them in mind. It is claimed that by this the court injected into the case the element of expense to the state as a proper matter to influence an agreement. But we do not so regard it. It is manifest that the court intended merely to reconcile the jury to a return, and to quicken them to a renewed effort to make true deliverance between the state and the prisoner according to the evidence and

the laws, as they had sworn to do; and there is no fair ground for supposing that they understood it otherwise, as a majority think.

There is no error in the proceedings, and the prisoner takes nothing by his exceptions.

N. R. NEWTON v. TOWN OF WATERFORD.

JANUARY TERM, 1895.

Pauper. Support in other town. Accord and satisfaction.

The plaintiff, while residing in defendant town, contracted to support one of defendant's paupers for a year, and entered upon the performance of the contract. Subsequently he removed with the pauper into another town. Defendant notified plaintiff that it would not pay for support after date of removal, and sent an order for the amount due up to date of removal, which plaintiff accepted. Plaintiff continued to support pauper after the expiration of the year, and claimed to recover upon the express contract for the balance of the year, and upon an *implied contract* after. *Held,*

1. That he might recover upon the express contract, for it was the duty of the defendant to take back the pauper if it wished to terminate that contract.
2. That he could not recover upon the implied contract, for it was the duty of the plaintiff to return the pauper at the end of the year.
3. That there was no accord and satisfaction, for the order was not tendered in full payment.

Assumpsit for the support of a pauper. Plea, the general issue. Trial by court at the June term, 1894, Caledonia county, TYLER, J., presiding. The court held upon the facts found that the plaintiff was not entitled to recover for the pauper's support, but might recover fifty cents for goods purchased for the pauper, and gave judgment accordingly. The plaintiff excepts.

W. P. Stafford for the plaintiff.

The defendant could not terminate the contract without taking the pauper back. *Durfey v. Worcester*, 63 Vt. 418.

There was no accord and satisfaction. *Van Dyke v. Wilder*, 66 Vt. 579.

Bates & May for the defendant.

The receipt of the order worked an accord and satisfaction. *McDaniels v. Lapham*, 21 Vt. 222; *Towslee v. Healey*, 39 Vt. 522; *Bromley v. School Dist.*, 47 Vt. 384.

ROWELL, J. The pauper, plaintiff's brother, has always been of unsound mind, and incapable of choosing a residence. His father died in Waterford in 1874, where he had lived for many years. He always lived with his father till he died, and then with his mother and the plaintiff till the latter was married in 1880, and then with the plaintiff. He was supported thus in Waterford till March, 1891, when the defendant's overseer of the poor agreed with the plaintiff to pay him one dollar and fifty cents per week towards the pauper's support, and payment at that rate was made quarterly for a year. At the end of the year the overseer agreed with the plaintiff to pay him two dollars per week for another year, and clothes and doctor's bills. Nothing was said as to the town in which the pauper should be kept. Defendant paid the stipulated price at the end of the first

two quarters, but before the expiration of the third quarter the plaintiff moved to St. Johnsbury and took the pauper with him, without the knowledge or consent of the overseer. Soon after his removal the plaintiff saw the overseer, and told him he had moved, and asked him to send the pay for that quarter to him at St. Johnsbury, and the overseer said, "All right." Nothing more was said about the removal of the pauper. At the end of the quarter the overseer sent to the plaintiff by letter, pay up to the time of his removal, and claimed that by the removal of the pauper the town was relieved from further liability for his support, and said that the town would stand on its legal rights in the matter.

Plaintiff now seeks to recover on the express contract for keeping the pauper from the time of his removal to the end of the year, and on a *quasi* contract for keeping him thence till the commencement of the suit.

As to recovery on the express contract, the rule is that although a party may, in general, terminate an executory contract, thereby subjecting himself to the payment of damages for non-performance, yet when the matter of the contract is the keeping of something that the repudiating party has delivered to the other, and for the support of which continued expenditure is necessary, such party cannot terminate the contract without taking back what he delivered. That rule was adopted and applied in *Durfey v. Worcester*, 63 Vt. 418, a case like this in its essential facts, and quite as strong against recovery, for there the overseer knew that the pauper was to be removed from the town, and protested against it.

As to recovery on a *quasi* contract, *Baldwin, Admr., v. Worcester*, reported in this volume, the sequel of *Durfey v. Worcester*, above cited, is decisive against such recovery. There the plaintiff sought to recover on a *quasi* contract for keeping the pauper after the expiration of the express contract; but it was held that the town was not

bound to go for the pauper after the expiration of the express contract for keeping him, and for not doing so was not liable for the support thereafter.

Nor was here an accord and satisfaction, for the order sent was not tendered in full payment of the town's liability, as claimed in argument, but in a way that left the plaintiff free to accept it and go for more.

Judgment reversed, and judgment for the plaintiff for \$34.43 and interest thereon from the date of the judgment below.

A. W. KENNEY AND FRANCES E. DOWNER,
EXRS.,

v.

AUSTIN HOWARD.

JANUARY TERM, 1895.

Settlement of the estates of deceased persons. Commissioners for the allowance of claims. When executor may prosecute action at law. What claims are barred by adjudication of commissioners. Plea to the jurisdiction. By whom signed.

1. A creditor may withdraw his claim presented to commissioners upon the estate of a deceased person at any time before it has been acted upon.

2. The probate court has no jurisdiction of claims in favor of an estate except in the way of an offset to claims presented against the estate, and the executor or administrator may commence and prosecute a suit at law in favor of the estate under R. L., s. 2131, until the debtor has presented a claim against the estate, and that claim has been acted upon by the commissioners.
3. After an executor or administrator has properly begun an action at law upon a claim in favor of an estate, all proceedings in the probate court in respect to that claim or any offsets thereto are suspended.
4. A plea to the jurisdiction of a court of general jurisdiction must allege not only that the court in question has no jurisdiction, but also that another court has.
5. A plea to the jurisdiction must be signed by the defendant in person, and not by his attorney.
6. A plea setting up a judgment in bar need not allege that such judgment is still in force.
7. A plea to an action brought in the name of executors, setting forth that "long before the beginning of the suit" the matters were adjudicated by commissioners upon the estate, states the date of the judgment with sufficient definiteness.
8. When several statements of fact are connected by the conjunction and, one allegation of time applies to all.
9. If a creditor presents his claim against an estate to commissioners, and the executor thereupon presents claims in favor of the estate in offset, and the commissioners act upon the matters so before them, *all* actions at law between the parties are thereby barred as by an adjudication, and a plea of this judgment in bar of a suit subsequently brought by the executor need not allege that the matters embraced in such suit were specifically passed upon by the commissioners.

Assumpsit. The defendant filed two pleas. Heard upon general demurrer to the same at the December term, 1893, Windsor county, START, J., presiding. Demurrer sustained. The defendant excepts.

The first plea was to the jurisdiction, and was as follows :

"And the said defendant by his attorneys, D. C. Dennison & Son, comes and says that the court here ought not further to take cognizance of or sustain the action aforesaid,

because he says that the cause of action aforesaid, if any ever accrued to the plaintiffs, is solely within the jurisdiction of the Hon. Probate Court within and for the district of Hartford, in said county of Windsor, and is not within the jurisdiction of said court, and this he is ready to verify; wherefore he prays judgment if the court here will take further cognizance of or sustain the said action, and for his costs. By his attorneys, D. C. Dennison & Son."

The second plea was in bar, and its substance is sufficiently stated in the opinion.

D. C. Dennison & Son for the defendant.

J. J. Wilson for the plaintiffs.

The plea to the jurisdiction should be signed in person and verified by oath. Gould, Pl., ch. 5, s. 27; 1 Chitty, Pl., pp. 441-444 (12th Am. Ed.).

The executors might bring suit at any time before the claim of the defendant had been acted upon. *Ewing v. Griswold*, 43 Vt. 400; *Soule v. Benton & Wilson*, 44 Vt. 309; *Sabin v. Kelton*, 54 Vt. 283; *Martin v. White & Hammond*, 58 Vt. 398; *Bliss v. Little*, 63 Vt. 86.

The plea should state that judgment was recovered upon the merits. *Swift v. Hamblin*, Bray. 189.

THOMPSON, J. The first plea to which the plaintiffs demurred is to the jurisdiction of the county court. It only alleges that the cause of action, if any, is solely within the jurisdiction of the probate court within and for the district of Windsor, and not within the jurisdiction of the county court.

The probate court, by the appointment of commissioners to receive, examine, and adjust all claims and demands of all persons against an estate, and all claims and demands exhibited in offset thereto, does not thereby acquire jurisdiction of claims in behalf of the estate, except as offsets to

adversary claims; and if a creditor of the estate who has presented his claim before the commissioners withdraws it, as he may, before the commissioners have acted upon it, their jurisdiction over any claim presented in offset thereto by the executor or administrator is taken away. *Allen v. Rice*, 22 Vt. 333; *Moore v. Batchelder*, 51 Vt. 50. If a creditor of the estate presents his claim to the commissioners for allowance, and the estate has claims or demands at law against him, which accrued to the deceased in his life, and the executor or administrator has not commenced an action thereon against the creditor as permitted by R. L., s. 2131, the probate court then, and not until then, has jurisdiction of claims or demands at law in behalf of the estate against such creditor. Before the probate court has thus acquired such jurisdiction, the county court has jurisdiction of claims in behalf of the estate, if they are of the character and amount to bring them within its general jurisdiction; and it retains such jurisdiction until commissioners have been appointed, and the creditor has presented his claim against the estate for allowance, and they have acted thereon. In other words, to oust the county court of such jurisdiction, commissioners must have been appointed on the estate, and the creditor of the estate must have presented his claims against the estate to them for allowance, and they must have acted thereon before the commencement of an action in the county court by the executor or administrator as permitted by R. L., s. 2131. *Sabin v. Kelton*, 54 Vt. 283; *Martin v. White & Hammond*, 58 Vt. 398. In the opinion of the court in the last cited case, delivered by Ross, J., it is said that R. L., s. 2131, "provides that the administrators or executors may commence a suit on such a claim, and attach property at any time *before* such party shall have presented his claim to the commissioners." It is sufficient to say that this language of the court in that case is not the language of this section, nor of the context, of the Revised

Laws. However, that case is not to be taken as in conflict with the rule which we have stated, as that suit was commenced before the defendant therein presented his claim against the estate to the commissioners, and the language of the court is to be taken as intended to apply to the facts in that case.

If an executor or administrator commences an action to recover a debt or claim in favor of the estate against a person having a claim or demand against it, either before or after such person has presented it to the commissioners for allowance, and before they have acted thereon, the jurisdiction of the probate court in respect to the claims or demands of either party, is ousted by the commencement and pendency of such action, and all proceedings thereafter in the probate court during the pendency of such action, in respect to the claims or demands of either party, are absolutely void. *Martin v. White & Hammond*, 58 Vt. 398; *Sabin v. Kelton*, 54 Vt. 283.

The county court is a court of general jurisdiction. In the case at bar it primarily had jurisdiction of the parties, the process and the subject matter, from which it could be ousted only as before stated. It is a general rule that a plea to the jurisdiction of a court of general jurisdiction must not only show that it has not jurisdiction, but must also show that another court has jurisdiction. *Doe ex dismiss. Rust v. Roe*, Burr. 1047; Gould Pl., ch. 5, s. 26. Under our peculiar system of probate law, and the special jurisdiction thereby conferred under certain circumstances upon the probate court to try and determine claims in favor of the estates of deceased persons against persons presenting claims against such estates before commissioners, we think a plea of this kind should allege such facts as show that it has such jurisdiction, and that failing to do this, it is bad for want of substance. The plea under consideration contains no such allegations.

This plea is also bad for the reason that it is signed by the defendant's attorney, and not by the defendant *in person*. "A plea to the jurisdiction must be signed by the defendant *in person*. For if signed by an attorney, who is an officer of the court, he is supposed to have signed by *leave* of the court; and the asking of leave is considered as a tacit *admission* of the jurisdiction." Gould Pl., ch. 5, s. 27.

It is not necessary for us to consider the other grounds of objection urged against this plea, as it already appears that the court below properly sustained the demurrer to it.

II. The second plea to which the plaintiff demurred professes to be a plea in bar. It alleges that "long before the beginning of this suit" Chester Downer deceased, and that the plaintiffs were duly appointed administrators of his estate, and accepted the trust and gave bonds; that commissioners were then and there duly appointed to receive, examine, and adjust all claims and demands of all persons against the estate, and all claims and demands exhibited in offset thereto; that the commissioners gave due notice of the time and place, when and where they would hear such claims; that the defendant appeared before the commissioners and exhibited his claim against the estate, and that the plaintiffs contested the same, and presented large claims in offset thereto; that a large balance was allowed the defendant against the estate by the commissioners, and by them reported to the probate court, and judgment was rendered thereon by it against the estate in favor of the defendant.

It is urged that this plea is bad because it does not allege that the judgment of the probate court still remains in full force, and not reversed, satisfied, or made void. Such an allegation is not necessary. If a judgment set out in a plea does not remain in full force, the other party may show it in the replication. 1 Saund. (6th ed. by E. V. Williams), 330, note 4.

It is further contended that the plea is bad because it does not state with sufficient precision the time when the judgment was rendered. After the formal part of the plea, the first allegation is that of time, viz., "long before the beginning of this suit," and then follow the other allegations, all of which are connected by the conjunction *and*. This is the only allegation of time in the plea, and applies to each fact alleged "according to the rule, that when several facts are stated in one continuous sentence, or in several sentences connected by the conjunction *and*, time, though alleged but once, applies to every fact." *Taylor v. Welsted*, Cro. Jac. 443; 1 Chit. Pl. 258; *Royce v. Maloney & Goff*, 58 Vt. 437. This is sufficient on general demurrer.

The plaintiffs also insist that this plea is bad because it does not allege that the judgment was recovered for the non-performance of the same identical promises or undertakings named in the declaration, and because it does not allege that the judgment was recovered on the merits of the case. In thus arguing, the plaintiffs mistake the nature and effect of this plea. It is not a plea of a former recovery by the plaintiffs on the same identical causes of action, but it is more far reaching than such a plea, because it goes to their right of recovery without regard to whether there has been a former recovery or not.

There are no pleadings nor forms of actions in proceedings before commissioners, and there is no way in which a judgment can be rendered by them except upon the merits of the claim or demand.

Commissioners having been appointed upon an estate, if a creditor thereof exhibits his claim against it to them for allowance, the executor or administrator must present all claims at law against such creditor in favor of the estate to the commissioners for allowance in offset, or must commence and prosecute an action to recover the same against such creditor as permitted by R. L., s. 2131, before the commis-

sioners have acted upon the claim of the creditor against the estate, otherwise such claims of the estate against him are forever barred. R. L., ss. 2125, 2127; *Probate Court v. Gale*, 47 Vt. 473; *Sabin v. Kelton*, 54 Vt. 283; *Spaulding v. Warner*, 59 Vt. 646; *Bliss v. Little's Admr.*, 63 Vt. 86. The plaintiff's declaration is in general assumpsit with special counts on notes, and sets forth causes of action predicated upon claims against the defendant which should have been presented to the commissioners in offset unless this suit was commenced before the commissioners had acted upon the defendant's claim presented against the estate. This plea alleges that the entire proceedings before the commissioners and in the probate court in respect to the defendant's claim, were had before the beginning of this suit, and the demurrer admits the truth of all the allegations of the plea well pleaded in substance. If the claims upon which the plaintiffs seek to recover in this action were presented before the commissioners and allowed in offset, they were then adjudicated, and this action cannot be maintained for their recovery; and if they were not thus presented, they are forever barred by reason of the failure to so present them. Hence, the plea sets forth a good defence to the plaintiffs' action.

Judgment as to the first plea affirmed.

Judgment sustaining the demurrer to the defendant's second plea, filed February 17, 1893, is reversed, and demurrer as to that plea overruled, plea adjudged sufficient, and cause remanded.

ANNIE MACK v. A. H. LEWIS.

OCTOBER TERM, 1894.

Appeal from justice. Within what time entered. Motion to dismiss. Waiver.

1. Under s. 18, No. 28, Acts 1892, an appeal from the judgment of a justice must be entered within twenty-one days, and if not so entered should be dismissed on motion.
2. The failure to enter an appeal within that time is a defect which may be waived by the appellee.
3. If the appellee appears in the county court and omits to move to dismiss within the time allowed for the filing of dilatory pleas, that will amount to a waiver.

Appeal by plaintiff from the judgment of a justice. Heard at the June term, 1894, Caledonia county, TYLER, J., presiding, upon a motion to dismiss. Motion overruled. The defendant excepts.

The judgment was rendered January 17, and the appeal entered June 2. The defendant entered a general appearance June 15. June 16 the plaintiff filed specifications, and July 17 the defendant filed this motion to dismiss.

Albert Perley for the defendants.

J. P. Lamson for the plaintiff.

Since this defect was not taken advantage of at the earliest opportunity, it is waived. *Dow v. School District*, 46 Vt. 108.

MUNSON, J. It is provided by s. 18, No. 28, Acts of 1892, that an appeal from the judgment of a justice shall be entered and docketed in the county clerk's office on or before twenty-one days from the time such appeal is taken. This appeal was not entered within the time limited, and the question is whether the county court should have dismissed the appeal on motion.

Before the passage of this act an appeal could be entered only in term time; and it was provided that if the appellant failed to enter the appeal at the next stated term of the county court, execution might issue on the justice judgment after the county court adjourned. The requirement that all cases should be entered by the second day of the term was merely a provision of the rules, and an entry could be had at any time during the term by special leave of the court.

We think the present law is intended to limit the time within which the appeal must be docketed to be of any avail. As to all original process it is provided in terms that if not filed in the clerk's office within the prescribed time, the process shall be of no avail. The purpose of each requirement is to bring the case to a speedier determination by affording an opportunity for completing the pleadings in vacation. We think it would be inconsistent with the spirit of the act, and a serious interference with its beneficial design, to give this provision a different construction.

But the appellant contends that whatever construction be given the statute, the refusal of the county court to dismiss this appeal was correct, because the motion to dismiss was not filed at the earliest opportunity, nor within the time limited by the rule. It was within the discretion of the court to permit the filing of the motion out of time as regards the rule; and the court, having passed upon the motion, must be held to have permitted its filing. But the motion was then to be overruled if not seasonably made according to the principles of pleading. It is well understood that a defect

of process that can be waived will be treated as waived if not complained of. The requirement is that the objection shall be taken at the earliest opportunity. The time available for this purpose does not necessarily extend to the taking of a continuance or the filing of some other plea. It is clear that this objection was not taken at the earliest opportunity if not taken within the time allowed by the rules of court for the making of dilatory motions. An entry out of time will not prevent an application of the rules if the defendant sees fit to appear. The appellee's entry of an appearance must be held to have subjected him to the running of the periods limited, at least upon a calculation made from the date of his appearance. Treating this appearance as entered upon the first day of the fourteen allowed by the statute, the motion was not made within the rule. This delay was a waiver of the defect in the appeal, if the defect was one that could be waived.

This holding is but the application of an ancient doctrine to modern practice. All dilatory pleas were held to be waived by the general imparlance of the old law. A general imparlance was the time allowed a party for pleading upon an application in which no right of exception was reserved. The general rules fixing periods for the filing of pleas have taken the place of these special leaves. If the allowance of a general imparlance on application was a waiver of the right to file dilatory motions, the running of the entire time allowed by rule for that purpose must have the same effect. Gould Plead., ss. 16, 17; *Pollard v. Wilder*, 17 Vt. 48.

The defect was one that could be waived. It was not anything affecting the jurisdiction of the court over the subject matter of the suit. The appeal was not absolutely void, but void until confirmed. The appellee could concur in submitting the case to the decision of the court, although not regularly entered. He did this by appearing, and per-

mitting the time allowed for dilatory motions to pass without raising the objection. *Huntley v. Henry*, 37 Vt. 165.

Judgment affirmed and cause remanded.

W. B. JOHNSON

v.

W. M. KELLEY AND R. DELWORTH, APTS.

JANUARY TERM, 1895.

Set off. Claims must be mutual. Breach of warranty defence to action for purchase price.

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1. In an action against two, the individual claim of one defendant against the plaintiff cannot be pleaded in offset.
 2. But, the action being upon a note given for the purchase price of an article sold by the plaintiff to one of the defendants, a breach of warranty in the sale may be shown in defence.
 3. If the judgment is correct, it will not be reversed for error in the proceedings.

Assumpsit upon a promissory note. Plea in set off. Trial by jury at the June term, 1894, TYLER, J., presiding. Judgment for the defendants to recover their costs. The defendants except.

The plaintiff brought suit on a note for fifty dollars signed by the defendants. This note and two others for one hun-

dred dollars each were given in payment for a pair of horses sold by the plaintiff to the defendant Kelley. The other two notes were not due when the action was begun. Kelley claimed a warranty in this sale, and plead a breach of it in offset, without also pleading the general issue. Upon this state of the pleadings the defendants claimed the right to begin and close, which the court denied subject to their exception. They also took certain exceptions to the admission of evidence during the trial.

The defendants claimed that if the jury found a warranty and its breach, the entire damages for the breach should be assessed, and that they were entitled to a judgment for the balance, if any, after deducting the amount of the plaintiff's note. The court held that the defendants could only recover damages to the amount of the note, to which the defendants excepted. The jury found for the plaintiff in the amount of the note, and for the defendants in the same amount.

Bates & May for the defendants.

W. P. Stafford for the plaintiff.

TAFT, J. Is it necessary to examine the questions presented by the record?

The plaintiff sought to recover the amount of a promissory note given, with other notes, for two horses, sold by him to defendant Kelley. The defendants admitted the execution of the note, and pleaded in set off a claim against the plaintiff in favor of the defendant Kelley, based upon a breach of warranty of said horses, and said Kelley filed a declaration in set off, claiming to recover for the same breach. The jury returned a verdict for the plaintiff for the full amount of the note in suit, and found damages for the defendants under the plea in set off equal to the amount of the note. The defendants' claim, although under the form of

set off, was clearly mere matter of defence to the original cause of action, and not a distinct claim against the plaintiff which could be pleaded by one of the two defendants in set off in this action. The breach of warranty of the horses for which the note was given was a proper matter of defence to the note, either upon the ground of failure of consideration, or by way of recoupment. But, no objection being made to a recovery under the plea in set off, it was immaterial whether the claim of the defendants was allowed as a defence to the note for want of consideration, or by way of recoupment, or under the form of a plea in set off. The amount allowed the defendant under the plea extinguished the full amount of the plaintiff's claim. Such being the fact, the defendants were not harmed if any or all of the rulings of the county court were erroneous, unless the defendants could recover under the declaration in set off an amount in excess of the damages awarded the plaintiff. It is claimed by the defendants that such recovery can be had, citing *Ashley v. Willard*, 2 Tyler 391, which holds that the individual demand of either of two defendants can be set off against the demand of the plaintiff against the two defendants. To the same effect is *Brundridge v. Whitcomb*, 1 D. Chip. 180; but it was said in *Leavenworth v. Lapham*, 5 Vt. 204 (1832), that the latter case was overruled in Chittenden county the preceding year. There are other cases which may tend to support this rule, but they are exceptional in their facts. See *Meader Surv. Part. v. Leslie*, 2 Vt. 569; *Mott v. Mott*, 5 Vt. 111, and are of doubtful authority upon this question. The statute of set off reads:

"If the plaintiff, in an action founded on contract, express or implied, is indebted to the defendant in such action on contract express or implied, the defendant, after pleading the general issue, or confessing the plaintiff's cause of action, may plead such indebtedness in set off."

Under this law it has long been held that the demands which can be set off must be mutual, and cannot embrace

any other than those between the nominal parties, and that the right to file claims in set off can never be maintained and pursued to any practical purpose in an action at law, unless the demands are legally mutual. *Leavenworth v. Lapham*, 5 Vt. 204; *Phelps v. Bulkeley*, 20 Vt. 17; *Bragg v. Fletcher*, Ibid 351; *Clough v. Clough*, 55 Vt. 360. Independently of the statute the court can set off mutual judgments at law and in equity. *Conable v. Bucklin*, 2 Aik. 221; *Rix v. Nevins*, 26 Vt. 384. The defendants requested the court to instruct the jury that if they found the warranty and the breach, the defendants were entitled to such damages as they had sustained by reason of the failure of the warranty. The court declined so to charge, but rendered judgment for the damages found under the plea in set off equal to the damages found for the plaintiff. As the defendants prevailed to the full extent of their rights in this action, and as the defendant Kelley could not recover under the declaration in set off, they were not harmed by the rulings of the court if erroneous. It is unnecessary to examine the questions for that reason.

Judgment affirmed.

TOWN OF FAIRFAX v. TOWN OF WESTFORD.

JANUARY TERM, 1895.

Pauper. No derivative residence.

In order to charge a town with the support of a pauper under No. 55, Acts of 1892, it must be shown that the pauper has a residence in the defendant town in his own right. There is no such thing as a derivative residence.

Assumpsit for the support of a pauper. Heard upon an agreed statement of facts at the April term, 1894, Franklin county, TAFT, J., presiding. Judgment for the defendant. The plaintiff excepts.

Watson & Flinn for the plaintiff.

The pauper's residence in his father's family was his residence. Acts of 1892, No. 55; *Wells v. West Haven*, 5 Vt. 322; *Morristown v. Fairfield*, 46 Vt. 33; *Anderson v. Anderson*, 42 Vt. 350; *Marshfield v. Tunbridge*, 62 Vt. 455.

He received no aid from any town, and therefore supported himself. *Craftsbury v. Greensboro*, 66 Vt. 585.

D. J. Foster for the defendant.

It has been once decided that there can be no derivative residence. *Marshfield v. Tunbridge*, 62 Vt. 455.

START, J. It appears from the agreed statement of

facts that Joseph Rousseau, the pauper in question, was born in the plaintiff town in 1869, where his father then lived and had his home. In 1873 the father moved from the plaintiff town to the defendant town with his family, including said Joseph, and lived there until 1881, when he and his family went to Massachusetts. In 1883 the whole family returned to the defendant town, and continued to live there until 1888 when the father again went to Massachusetts, leaving his son Felos, a young man about twenty-four years of age, in charge of the property and family, including said Joseph. The father went to Massachusetts for a temporary purpose, intending to return, but died while there in June, 1888. After the father's death Felos, as head of the family, continued to live in the defendant town in charge of the property and family, including said Joseph, until May 24, 1890, when the family, including Joseph, moved to the plaintiff town, where they have since lived and had their home. Owing to the mental and physical condition of Joseph, he has ever been and still is incompetent and incapable of taking care of himself, or of exercising any choice or intention as to residence. While the father was alive and up to the time of his death, Joseph was supported by him; and since his death, Joseph has continued to live in and been supported by the family until he came to want, May 6, 1893, in the plaintiff town.

From this statement it is clear that Joseph never resided in the defendant town for three years supporting himself, within the meaning of No. 55, of the Acts of 1892. This act provides that if a person is poor and in need of assistance for himself or family, it shall be the duty of the overseer of the poor of any town, when application for such assistance is made, to relieve such person or his family; and if such person has not resided in such town for three years, supporting himself and family, and is not of sufficient ability to provide such support, the town so furnishing assistance may

recover the expense of the same from the town where such person last resided for the space of three years, supporting himself and family.

If the father had continued to live, and Joseph had continued unemancipated and a member of the father's family, and the father had been poor and in need of assistance for Joseph as a member of his family, and the plaintiff had furnished the assistance, it could probably recover the expense incurred in furnishing such assistance of the town where the father last resided for three years, supporting himself and family. In that case the father would have been the poor person in need of assistance for a member of his family. The assistance would be furnished to the family of a poor person in need. But the father is not a poor person in need of assistance for himself or his family; he is dead. Joseph is the poor person in need of assistance for himself. It is not shown that he is a member of the family of a poor person in need of assistance for himself or his family. There is no head of a family through whom the defendant can be made chargeable for Joseph's support. The assistance was furnished directly to Joseph, and not through the family of a poor person in need of assistance for himself or his family. He must be regarded as disconnected from any family, and as a poor person in need of assistance for himself.

In order to maintain an action under this act, the plaintiff must show that the poor person to whom, or to whose family, assistance has been furnished, last resided in the defendant town for three years, supporting himself and family. In this case, the father of Joseph being dead, the assistance was not furnished to a member of the family of a poor person in need of assistance for himself or his family, but was furnished to a poor person in need of assistance for himself. The plaintiff was called upon to show that Joseph last resided in the defendant town for three years, supporting himself. This it has not done. Joseph has never resided

in any town, supporting himself. He does not take his father's residence. To maintain an action under the act, it must appear that the poor person to whom, or to whose family, assistance has been furnished, has a residence in the defendant town in his own right. The act does not provide for a derivative residence. In this respect the act is not unlike the act of 1886. That act was construed in *Marshfield v. Tunbridge*, 62 Vt. 455, and it was there held that an unemancipated minor, while he lives with and is maintained wholly or in part by his parents, does not reside or maintain himself within the meaning of the act.

Judgment affirmed.

C. A. CRAMPTON, ADMR., APEE.,

v.

MARY L. AND JULIA L. SEYMOUR, ADMRS.,
APTS.

JANUARY TERM, 1895.

*Life interest. Right of administrator to sue. Evidence.
Account stated, when conclusive.*

1. The plaintiff's intestate took under her husband's will a life interest in and absolute title to all his property, subject to the payment of a small legacy out of what might remain at her death. *Held*, that the plaintiff, as her administrator, could recover from the defendant money which he had received as her agent during her lifetime.

2. The intestate was mentally and physically feeble, and the defendant transacted her business for her, receiving and disbursing money on her account. *Held*, that evidence that upon one occasion the defendant received pay for some cattle belonging to her, that upon another occasion he exhibited a sum of money, saying that it was money of the intestate, and that upon still another occasion he searched the trunk of the intestate, and carried away a sum of money found there after giving her a receipt, tended to show that defendant had these several sums, and should account for them.
3. But that defendant, upon being told by a creditor of the intestate that he had paid her a sum of money, said he must go and get it, does not tend to show that this sum ever came into his hands.
4. An account stated as settled is not conclusive as to items not embraced in it.
5. It did not appear that there was any contract between the intestate and defendant that defendant should receive compensation for his services. *Held*, that the declarations of the defendant that he did not expect anything were evidence tending to prove that fact, and that the finding of the county court disallowing his claim for services would not be disturbed.

Appeal from an order of the probate court for the district of Franklin. Trial by court at the April term, 1894, Franklin county, TAFT, J., presiding. Judgment upon the facts found by the plaintiff in the sum of one thousand two hundred seventy-seven dollars and eighty-three cents, and costs. The defendants except.

The plaintiff brought suit as the administrator of Emeline Hawkins, and the defendants were the administrators of H. P. Seymour. Emeline Hawkins was the wife of Alfred Hawkins, who died in January, 1885, leaving a farm and considerable personal property, all of which he bequeathed upon certain conditions to his wife Emeline. The will was probated in March, 1885, and no further steps were ever taken in the settlement of the estate or the distribution of the property. Mrs. Hawkins took possession of it, and managed it as her own down to her death. In this she was

guided by the advice of Mr. Seymour who, on account of his intimate personal relations with Mr. Hawkins while alive, continued to act as her adviser and manager to a great extent after his death. Mrs. Hawkins, with advancing years, became very feeble in both mind and body, and the conduct of her affairs fell more and more into the hands of Mr. Seymour, until during the few years which preceded his own death in 1892 he transacted practically all her business. He kept an account of certain matters between Mrs. Hawkins and himself from 1886 to 1889, and from the latter date until his death he kept an accurate account in detail of all matters between them. Copies of these accounts were from time to time furnished her. No one of the items allowed by the court as hereinafter stated was embraced in these accounts.

The plaintiff claimed to recover for various sums of money which Mr. Seymour had received on account of Mrs. Hawkins, and had not accounted for. The court charged him with the following items as of the dates named :

February, 1885, one hundred and twenty dollars.

February, 1885, ninety dollars.

April 3, 1889, six hundred and fifty dollars.

July 6, 1889, four hundred eighty dollars and forty-three cents.

The court gave judgment for these sums with interest, less the balance found due Mr. Seymour from year to year.

The defendants objected that the title to this property in Mrs. Hawkins was not such under husband's will that her administrator could maintain this suit. Those portions of the will material to a decision of this question are fully stated in the opinion.

The defendants further objected that there was no evidence tending to show that Seymour had the various sums with which his estate was charged by the judgment. The evidence upon these several points is stated in the opinion.

The defendants presented a claim in offset for the services of Mr. Seymour, but the court found that he had never made such a charge in his lifetime, and had said that he did not intend to, and disallowed the claim.

Wilson & Hall for the defendants.

The title to all this property remained in the estate of Alfred Hawkins, and his representative alone could sue for it. *Parks' Admr. v. American Home Missionary Soc.*, 62 Vt. 19; *Shoul., Exrs. and Admrs.*, 2d Ed., ss. 120, 186, 190; *Eisenbise v. Eisenbise*, 4 Watts 134; *Tappan v. Tappan*, 30 N. H. 50.

A judgment in this case would be no bar to such a suit. *Shaw, Admr., v. Hallihan and Wife*, 46 Vt. 389; *Manville, Admr., v. Briggs*, 17 Vt. 176; *Walton, Admr., v. Hall's Est.*, 66 Vt. 455.

By accepting without objection the accounts as stated by Mr. Seymour, Mrs. Hawkins is estopped to deny their accuracy. *Tharp v. Tharp*, 15 Vt. 105; *Wiggins v. Berkham*, 10 Wall. 129; *Lockwood v. Thorne*, 11 N. Y. 170.

Hogan & Royce for the plaintiff.

The declarations of Seymour, that he intended to make no charge, were evidence tending to show that fact. 1 Greenl., Ev., (14th Ed.) ss. 171, 189; *Conn. River Savings Bank v. Albee's Admr.*, 64 Vt. 571; *Wheeler v. Wheeler's Est.*, 47 Vt. 637; *Wead v. St. J. & L. C. Rd. Co.*, 66 Vt. 420; *Laurent v. Vaughn*, 30 Vt. 90.

Since Seymour received this money in trust for Mrs. Hawkins, he and his representatives are estopped to deny her title. *Kane v. Bloodgood*, 7 Johns. Ch. 110; *Taylor et al. v. Benham*, 5 How. 233; Big., Estop., pp. 545, 552; *Kinsman v. Parkhurst*, 18 How. 289; 1 Pars., Con., (7th Ed.) 93; *Soper v. Frank*, 47 Vt. 368.

The estate of Alfred Hawkins vested in the intestate upon his death. R. L., s. 2049; 2 Redf., Wills, *215; *Bridgman v. St. J. & L. C. Rd. Co.*, 58 Vt. 198; *Ex parte Fuller*, 2 Story 327; *Hibbard v. Ricart*, 3 Vt. 207; *Cushman v. Jordan*, 13 Vt. 597; *Hyde v. Barney*, 17 Vt. 280; *Austin v. Bailey*, 37 Vt. 219; *Casey v. Casey*, 55 Vt. 518.

TYLER, J. The plaintiff, as administrator of Emeline L. Hawkins' estate, seeks in this action to recover moneys of the estate which it is claimed Mr. Seymour received in his lifetime, and for which he never accounted. Said Crampton was duly appointed guardian of Mrs. Hawkins soon after the death of Seymour, and during her life brought this suit as her guardian; after her death, by leave of court, he entered to prosecute.

The interest which Mrs. Hawkins had in the estate of her husband was derived from the following clauses in his will:

"I give and bequeath to my well-beloved wife, Emeline L. Hawkins, all my property, both real and personal, to be hers absolutely and forever, to use and dispose of during her life for her own benefit; and of what remains of said property, at my said wife's decease, I give to my beloved niece, Martha Smith, five hundred dollars, and the remainder of said property my will is that my said wife may dispose of as she may prefer.

"It is my intention by the foregoing provisions to give my said wife the right to use, for her own support and comfort during her life, all of said property if needed by her for that purpose, and that if not so needed, the remainder, to the extent of five hundred dollars, shall go to the said Martha Smith before any of said property shall be given to any other person."

The will was proved and allowed March 27, 1885, but no further proceedings were had under it; the estate was never settled, and no decree was made by the probate court respecting it. No executor or administrator was appointed. Mrs. Hawkins took possession of the farm and personal property and treated them as her own, acting under Mr.

Seymour's advice in the management thereof until his death on March 17, 1892.

It is contended by the defendant's counsel that, as Mrs. Hawkins did not dispose of the estate by will, she took only a life interest therein, and that no action therefor can be maintained by her administrator. The will gave her the possession and control of the estate during her life, the right to use it all, if necessary, for her support and comfort, and to dispose of whatever was left at her decease except five hundred dollars. Her duty was to collect the assets, pay the debts and expenses, and hold the remainder in trust for her own support during life and for the niece's legacy. Whatever part of this duty remained unperformed at her death clearly devolved upon her administrator. It is difficult to see how it could have devolved upon any other person. As Seymour received the money as Mrs. Hawkins' agent, neither he nor his administrator could dispute the right of the plaintiff to sue for it.

There was evidence tending to show that Finn paid Seymour ninety dollars for cows that came from the Hawkins place; that on one occasion Seymour went upon the porch of the Hawkins house and exhibited one hundred and twenty dollars or more to a witness, and said it was "Hawkins money," and asked the witness to count it so that someone would know how much there was of it; that at another time in the presence of other witnesses, he searched Mrs. Hawkins' trunk and found therein six hundred and fifty dollars, which he carried away after giving her a receipt. The finding of the county court in relation to these three items cannot be revised here, as there was some evidence to support them, and its weight was for that court to determine.

The evidence in relation to the item of four hundred eighty dollars and forty-three cents tended to show that after her husband's death Mrs. Hawkins was physically and mentally feeble, and that Seymour took the principal management of

her affairs, carried on the farm and took the income from it, collected and invested money due the estate, and said he did not intend to leave money or notes in her house; that he did this because he and her husband had been friends, and the latter had done him favors; that he called on one Whittemore who owed the estate, and requested him to pay his note unless he would pay six per cent interest; that Whittemore decided to pay the note; that the interest was then reckoned and an indorsement made; that Whittemore soon after paid the amount of the note to Mrs. Hawkins; that two or three weeks after he saw Seymour and told him he had paid her; that Seymour seemed surprised, and said he should go and get the money and loan it to another man who had applied for it.

Every presumption will be made in favor of the judgment of the court below, but in this case the evidence on which the judgment was based is before us, and it does not tend to show that Seymour took this money from Mrs. Hawkins. If it were a part of the six hundred and fifty dollars, the defendant estate is charged with it in that item. The evidence tended to show that Seymour thought Mrs. Hawkins incapable of doing any business, yet this and other money was paid to her, and she may have disposed of it herself. We think the court was not justified in inferring from the relations that existed between the parties that Seymour had this money, and it was therefore error to charge it to his estate. Seymour acted in a trust capacity, and as he and Mrs. Hawkins both received funds, it should appear that the Whittemore money actually came into his hands before his estate should be charged therewith.

The plaintiff is not barred from recovering the ninety dollars, one hundred and twenty dollars and six hundred and fifty dollars, by the doctrine of account stated. The court below found that from January, 1886, until the spring of 1889 Seymour "kept an account with Mrs. Hawkins of cer-

tain matters," and that copies thereof were furnished her; that there was a balance due him of thirty-six dollars and seventy-one cents, which he charged in the beginning of a new account June 17, 1889, after which until within five days of his death he kept a full and accurate statement of items furnished her. An inspection of this account shows that he charged her with items for taxes, insurance, repairs of buildings and fences, for labor on land, family supplies and other similar items, and that he credited her with receipts for farm produce and rent of pasture. At the end of the first year there was a balance of fourteen dollars and six cents due Mrs. Hawkins, which he says in a memorandum at the foot of the account he paid to her. At the end of the next year a balance of forty-one dollars and ninety-four cents was due him, of which he notes payment. After that the balances were in his favor and not settled, but were carried forward to new accounts.

In *Holmes & Drake v. D'Camp*, 1 Johns. 34, the court said that formerly the stating of an account was considered so deliberate an act as to preclude any examination into the items, citing *Truman v. Hunt*, 1 T. R. 40, but that of late greater latitude had prevailed, and that any errors may be shown and corrected.

The accounts rendered by Seymour were at most conclusive only as to the liability of the parties with reference to the transactions included in them. 1 Bouv. Law Dict. 86, defining account stated at law. Acceptance must be by a competent person, excluding infants and those of unsound mind. *Truman v. Hunt*. The plaintiff's evidence tended to show that Seymour considered Mrs. Hawkins incompetent to transact business. If this were true, no acceptance of the accounts rendered could be predicated of her. The court made no finding on this subject, nor does it appear that any question in respect to Mrs. Hawkins' acceptance of or ac-

quiescence in the accounts or her competency to accept or acquiesce was raised.

This subject is discussed in the notes to *Philips v. Belden*, 3 Edw. Ch. 1, where cases are cited and the doctrine stated, that in no case has an implied admission of the correctness of an account from lapse of time and failure to object been held to be an estoppel, but that these facts merely make a *prima facie* case so as to cast the burden of proof on the party who thus remains silent. Example: writing up a bank book and depositing in it forged checks and returning the book and vouchers, which constituted a statement of an account by the bank; but as the bank had taken no action and lost no rights in consequence of the depositor's silence, the only effect of the depositor's omission to examine the account and make objection was to cast the burden on him to show the fraud or mistake. *Brown v. Kimmel*, 67 Mo. 431; *Perkins v. Hart*, 11 Wheat. 256; *Wiggins v. Burkham*, 10 Wall. 129. An account stated as settled is a mere admission that it is correct. It is not an estoppel; it is still open to impeachment for errors or mistakes. *Hutchinson v. Market Bank*, 48 Barb. 324; *Young v. Hill*, 67 N. Y. 176. Other cases cited in these notes are to the effect that an account stated may be impeached for fraud or mistake. It was held in *Manhattan Co. v. Lydig*, 4 Johns. 377, that where an account has been settled it may be opened for the purpose of falsifying particular items, though it cannot be opened generally. *Tharp v. Tharp*, 15 Vt. 105, is in consonance with this rule.

One rule is clear in regard to these accounts, that they are not conclusive upon what they do not contain, upon items which Seymour did not charge himself with and which the court below found, upon sufficient evidence, came into his possession.

The defendants do not claim that there was an express contract between Mrs. Hawkins and Mr. Seymour by which the

latter was to be compensated for the services which he rendered, but they contend that there was an implied promise on the part of Mrs. Hawkins ; that as Seymour never said to her that he was performing the services gratuitously, she should have presumed that they were to be paid for. The law would not imply a promise in Seymour's favor against his own declared intention not to charge ; therefore, his declarations even to third persons had some tendency to show what his intention was in this respect, and were properly admitted. The charges in favor of Seymour's estate for services were properly disallowed.

The judgment of the court below was correct, except in allowing the plaintiff the item of four hundred eighty dollars and forty-three cents.

Judgment reversed, and judgment for the plaintiff for six hundred fifty-three dollars and fifty-two cents, to be certified to the probate court.

FRED BLANCHARD v. R. C. BOWERS.

JANUARY TERM, 1895.

Building on land of another real estate. Tenancy from year to year. Notice to quit.

1. A building erected upon the land of another under arrangement with the owner of the land that it shall be removed when required, is real estate.
2. If a tenant has occupied such a building under a parol lease for many years, paying an annual rent, he is entitled to a notice to quit of six months, looking to the end of the year.

. Trespass. Plea, the general issue. Trial by jury at the March term, 1894, Washington county, TYLER, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The injuries complained of were to a certain building standing upon the land of the Central Vermont Railroad Company in Montpelier, and which the plaintiff claimed the right to occupy as the tenant of one Carl Bancroft. The defendant justified his acts as the owner by purchase from this same Bancroft. The plaintiff claimed that upon the facts stated in the opinion the building was real estate, and he, as a tenant from year to year, entitled to six months' notice to quit. The defendant insisted that the building was personal property. The court held with the plaintiff and so instructed the jury, to which the defendant excepted.

Dillingham, Huse & Howland for the defendant.

The building was liable to be removed at any moment, and no tenancy requiring a six months' notice to quit could arise. Wood, Land & Ten., s. 86.

S. C. Shurtleff for the plaintiff.

The building was real estate. *Stafford v. Adair* 57 Vt. 63.

THOMPSON, J. The evidence does not disclose under what arrangement, if any, with the Central Vermont Railroad Company Arthur D. Bancroft's storehouse was erected and maintained on its land in his lifetime. But it does appear that after his death Johonnott, the guardian of Bancroft's children, in March, 1885, made an arrangement with the railroad company by which it gave him a written license "to erect or construct or repair the old Bancroft storehouse," then on its land, upon the condition, among others, that he should remove all structures made by him on this ground, and surrender up the premises whenever required to do so by the railroad company. This created a tenancy at will in the land, and Johonnott and Carl Bancroft, his assignee, by the plaintiff as their tenant, have ever since had possession of the premises under this arrangement, and it does not appear that they have ever been disturbed in their possession, or called upon by the railroad company to surrender the premises. The plaintiff was in possession of the storehouse at the death of Arthur D. Bancroft under, as he claimed, an oral lease thereof for the term of fifteen years, and attorned to the administrator of Arthur D. for the rent until 1882, when he commenced to pay it to Johonnott as guardian, and paid the same to him annually until 1888 at the rate at which he had paid the administrator, and thereafter at double that rate until July, 1892, and thereafter at the last named rate to Carl Bancroft.

The court below held that as to the plaintiff the storehouse

was real estate, and that he was tenant at will, and as such was entitled to six months' notice to quit looking to the end of the year, and the question of damages was submitted to the jury on this basis. The defendant contends that in this there was error.

Stafford v. Adair, 57 Vt. 63, was a bill to foreclose a mortgage. The property described in the mortgage was a shop erected by Adair upon the land of the Bennington & Rutland Railroad Company under a parol arrangement, that if at any time in the future it should wish to resume possession of the lot it might give Adair thirty days' notice, within which time he should be at liberty to move off the structure if he desired. Subsequent to the execution of the mortgage Adair was adjudged an insolvent debtor, and his property assigned under the statute to an assignee. The controversy was between the mortgagee and the assignee, the latter claiming that the shop was personal property, and passed to him by virtue of the assignment. It was held that the estate which Adair acquired in the land under his arrangement with the railway company was that of tenant at will, and that his estate came within the definition of the words *land, lands and real estate*, under R. L., s. 9. Under this decision we think the court below was correct in holding that the storehouse was real estate as to the plaintiff, and that he was a tenant at will.

This is the only question now raised by the defendant.

Judgment affirmed.

STATE v. WILBUR E. PERRIGO.

JANUARY TERM, 1895.

*Motion for new trial. Discretionary with county court.
Justification. Harmless error.*

1. A motion for a new trial is addressed to the discretion of the trial court, and the supreme court cannot revise the exercise of that discretion unless some question of law is reserved.
2. It is not error to refuse to comply with a request to charge unless the evidence warrants the request.
3. *Held*, that the evidence did not tend to show a justification of the assault by the respondent upon the officer, whether the arrest was lawful or unlawful.
4. If the respondent cannot have been harmed by an error in the charge, the judgment will not be reversed.

Indictment for an assault with intent to kill. Trial by jury at the September term, 1894, Chittenden county, THOMPSON, J., presiding, Verdict, guilty. Judgment and sentence on verdict. The respondent excepts.

The respondent was indicted for shooting at one McElliott while McElliott and another police officer were attempting to arrest him. He claimed that the attempted arrest was unlawful for the reason that the officer making it had no warrant, and asked the court to so instruct the jury. This the court declined to do, and the respondent excepted.

The respondent also claimed that he was justified in making the assault for which he was indicted, and upon this subject requested the court to instruct the jury as follows :

"That if at the time Officer McKenzie took hold of the person of respondent, saying that he arrested him, respondent believed that Officer McElliott had drawn his revolver with the purpose of assisting McKenzie in arresting respondent, and with the intent to shoot respondent if he resisted arrest, he was not obliged to retreat or go to the wall, but had the right to shoot McElliott and to continue to shoot him so long as McElliott continued to handle his revolver in a manner causing respondent to think that he intended to shoot respondent."

This the court declined to do, and the respondent excepted.

What the evidence upon this branch of the case was fully appears in the opinion.

Charles T. Barney for the respondent.

Arrest for a misdemeanor without warrant by one who does not see the offence is illegal. *Rex v. Bright*, 4 C. & P. 387; *People v. Smith*, 5 Cow. 258; *Com. v. Wright*, 158 Mass. 149; *Black v. State*, 2 Md. 376; *Com. v. Carey*, 12 Cush. 246; *Com. v. McLaughlin*, 12 Cush. 615; *Scott v. Eldridge*, 154 Mass. 25; *Kurtz v. Moffit*, 115 U. S. 487.

An officer using unnecessary force in making even a legal arrest may be resisted. *Agee v. State*, 94 Ind. 344; *Jones v. State*, 26 Texas App. 1; *Rex v. Hagan*, 8 C. & P. 167; *Skidmore v. State*, 43 Texas 93; *Golden v. State*, 1 S. C. 292; *Rungan v. State*, 57 Ind. 80; *Miller v. State*, 74 Ind. 1; *State v. Nimbush*, 9 S. C. 309; *Alford v. State*, 8 Texas App. 545.

R. E. Brown, State's Attorney, and *J. E. Cushman* for the state.

If one kills an officer to prevent the making of an illegal arrest, he is guilty of manslaughter; and if the killing is accompanied with malice, it is murder. *Hawley on Arrest*, 55; 3 Greenl., Ev., s. 123, and note; 1 Russ, Crimes, 617; 1 Whart., Crim. Law, s. 414; *Galvin v. State*, 6 Cold. 283,

295; *Rafferty v. People*, 72 Ill. 37, 40; *Roberts v. State*, 14 Mo. 138, 146; *Williams v. State*, 44 Ala. 41, 45; *Noles v. State*, 24 Ala. 672; *Com. v. Carey*, 12 Cush. 241; *Com. v. Drew*, 4 Mass. 391; *Tackett v. State*, 3 Yerg. 392, 394.

The officers had a right to arrest the respondent without a warrant. 4 Chit. Crim. Law, 928; 1 Hale P. C. 530; Hawley on Arrest, 35; *People v. Lyon*, 99 N. Y. 217; *Drennan v. People*, 10 Mich. 187; *Com. v. Carey*, 12 Cush. 241, 252; *People v. Wilson*, 55 Mich. 506, 516.

ROSS, C. J. I. It is not contended that there is, on the face of the indictment, any insufficiency which is reached by the respondent's motion in arrest of judgment and sentence. The respondent claims that his motion for a new trial ought to have been granted. The motion is unsupported by oath, affidavit or deposition, and the county court has not placed on the record a statement of the facts which were found by it, on the hearing upon this motion. Nor has it found that the statements embodied in the motion are true. Primarily, such motions are addressed to the judicial discretion of the county court. Its decision is not revisable unless, in passing upon it that court reserves a question of law for the consideration of this court. The record does not reserve any such question. It is to be presumed that the county court properly and legally overruled the motion, until something on the record makes the contrary appear. The exceptions to overruling these motions are not sustained.

II. The charge in respect to the amount of force which the respondent might use in resisting his arrest, if unlawful, short of taking life or assaulting with intent to kill, was satisfactory to the respondent, and was not excepted to. The respondent's counsel does not now claim if the arrest were unlawful, that the respondent could justify the taking life or an assault with intent to take life, unless officer McElliott first made such an assault upon the respondent that he had

reason to believe and did believe that his life was endangered, or that he was in danger of grievous bodily harm, and honestly judged it necessary to draw his pistol and discharge it at McElliott to protect himself against such assault. This would be the law if the testimony tended to establish a state of facts which rendered it applicable. The arrest by Officer McKenzie was made by taking hold of the respondent and saying "I arrest you." The respondent knew that McKenzie and McElliott were officers, and had come to have him go with them to the office of the chief of the police, where a charge of petit larceny had been lodged against him. All the evidence—there was no conflict in it—tended to show that the respondent when told he was arrested instantly drew his pistol from his hip pocket and thrust it in McKenzie's face, saying with an oath, "You let me go." McElliott, who had been watching the respondent while he was covering his pistol in his pocket with his handkerchief, at the instant the respondent thrust his pistol in McKenzie's face, cried out, "Hold on, Perrigo," and drew his revolver from his pocket. Thereupon the respondent turned and fired his pistol at McElliott. McElliott retreated, trying to, but not succeeding in getting his pistol so he could discharge it. The respondent pursued and fired two more shots at McElliott. All that McElliott did was in assisting McKenzie in arresting the respondent. There was no testimony tending to show any different state of facts. On this statement the respondent had no reasonable ground to believe that he was in danger of great bodily harm from the arrest by McKenzie, nor from any assistance which McElliott offered in making the arrest. On the contrary, the respondent first began the use of the pistol to resist a gentle arrest by McKenzie, and McElliott seeing it called to him to hold on, when the respondent turned and discharged his pistol at McElliott, and pursued him, discharging his pistol at him. The testimony did not tend to establish any such facts as entitled the respondent to have his

request on this point complied with. A request may be good law if the testimony tends to establish the facts embodied in or assumed by it. Yet it would be the duty of the court to refuse to comply with it if there was no testimony tending to establish the facts assumed or embodied in it. This is the inherent defect in the respondent's request and contention on this branch of the case. This exception is not sustained. This was the most favorable light for the respondent in which the testimony could be considered. On this view, except in the particular just disposed of, the charge of the court was satisfactory to the respondent.

Inasmuch as the uncontradicted testimony in the case did not tend to show a justification of an assault with his pistol upon McElliott, if the respondent made the assault, and if his arrest was without lawful authority, much more did it not tend to show such justification if the arrest was made with lawful authority. Hence we need not, and have not, decided the other questions discussed, whether the crime for which the arrest was made was of such a character that Officer McKenzie had the right to arrest him, under the circumstances disclosed, without a warrant therefor. The respondent could not have been harmed by the charge on that subject, for that on any state of facts which the testimony tended to establish the respondent could not justify his assault with a deadly weapon upon McElliott.

Judgment; there is no error in the proceedings, and that respondent takes nothing by his exceptions.

TOWN OF SOUTH BURLINGTON

v.

TOWN OF WORCESTER.

JANUARY TERM, 1895.

*Pauper. Residence. Intention. Implied contract.
Evidence.*

1. A helpless pauper of full age, who resides in his father's family and is supported by him without aid from any town, is a resident of the town in which the father lives.
2. Where such a pauper has been for many years a member of his father's family, and has no other home and no means of providing one, and the father removes with his family, including the pauper, into another town, the residence of the pauper changes with that of the father, irrespective of any intention which the pauper may or may not have as to the place of his home.
3. The pauper was a helpless cripple without means, who for many years had lived in his father's family and been supported by him. Previous to December, 1888, the defendant town had contracted with the father to support the pauper until June, 1889. In December, 1888, the father, against the protest of the defendant, removed with the pauper into the plaintiff town, and continued to reside there, supporting the pauper without further arrangement with the defendant until his death, November 1, 1890. Thereupon the plaintiff was applied to, and assumed the support of the pauper. *Held*, that the plaintiff could not recover of the defendant for the support thus furnished, no claim being made under No. 55, Acts 1892.

4. The defendant was under contract with the pauper's father to support him until the termination of a certain suit, which ended June 1, 1889. The plaintiff claimed that after the termination of this suit the father supported the pauper under an implied contract with the defendant. *Held*, that evidence that the father learned of the termination of the suit and afterwards began and prosecuted a claim against the defendant for support furnished subsequently to June, 1889, had no tendency to show such an implied contract, and was improperly admitted.

Assumpsit for the support of a pauper. Plea, the general issue. Trial by jury at the April term, 1894, Chittenden county, ROWELL, J., presiding. A special verdict was taken, and judgment given thereon for the plaintiff. The defendant excepts.

S. C. Shurtleff for the defendant.

The defendant was under no obligation to support the pauper in the father's family after the termination of its contract with the father, nor to bring the pauper back to Worcester. *Durfey v. Worcester*, 63 Vt. 418; *Danforth v. Walker*, 37 Vt. 239.

Therefore, the pauper was a resident of the plaintiff town when that town was applied to for aid. *Chittenden v. Barnard*, 61 Vt. 145; *Chittenden v. Stockbridge*, 63 Vt. 308; *New Haven v. Middlebury*, 63 Vt. 399; *Craftsbury v. Greensboro*, 66 Vt. 585.

D. J. Foster for the plaintiff.

The pauper, while supported in the plaintiff town by the defendant town, was transient in the plaintiff. *Leicester v. Brandon*, 65 Vt. 544.

THOMPSON, J. This is an action to recover for the support of Daniel Durfee, a pauper, from December 23, 1890, to January 18, 1893. The plaintiff's evidence tended to show

that Milo Durfee, the pauper's father, formerly lived in East Montpelier, and moved from there to Worcester.

When Daniel was a little past twenty-four years old he was so hurt that it made him a helpless cripple for life. When he was thus hurt his father was living in Worcester, and had then lived there about six years. Daniel had always made his home at his father's, although he had worked out more or less, and had his wages after he became of age. He had a little property at the time he was hurt, and for the first year thereafter his father took care of him without aid from the town, but was paid therefor by Daniel; but at the expiration of that year, Daniel's property having been exhausted, East Montpelier was applied to for his support and assumed it, and continued to support him until the passage of St. 1886, No. 42, when it withdrew its support and refused further aid. Thereupon, Daniel still residing in Worcester with his father, where they had both continued to live, Worcester was applied to for Daniel's support and assumed it for the time being, at the same time claiming that East Montpelier was still liable for his support notwithstanding that law, and brought suit against it to test the question, and such proceedings were had therein that it was finally decided that East Montpelier was not thus liable, but that the burden of such support was cast by that law upon Worcester. While that suit was pending and before December, 1888, Worcester, by its overseer of the poor, agreed with the pauper's father to pay him five dollars a week to take care of him until that suit terminated, and the father took care of him under such contract, for which Worcester paid him quarterly before the December last named the sum called for by the contract. About December 1, 1888, Milo Durfee prepared to move his family and Daniel to South Burlington; and the overseer of the poor of Worcester hearing of it objected to Daniel's being removed from the town, and told Milo Durfee that he must not take him out of town, and that if he did the town would not thereafter pay anything for his

support ; and that he himself would take Daniel, or get a place for him, but that he must not be taken out of the town. Thereupon Milo Durfee told the overseer that he should take Daniel with him, if he went, whether the town paid him anything for his support or not ; and about that time he moved to South Burlington, taking Daniel with him, and thereafter continued to reside there until his death in November, 1890, and Daniel remained in his family all the time and was supported by him. After Milo Durfee's death the family continued to reside in South Burlington, and Daniel still remained in the family until his death, which occurred March 25, 1893. After the death of Milo Durfee application was made to South Burlington to aid Daniel, who was poor and in need of relief, and that town thereupon assumed his support in December, 1890, and immediately thereafter gave Worcester the necessary notice that he was chargeable to South Burlington, and that that town would look to Worcester for reimbursement in the premises. The plaintiff continued to support the pauper until his death at an expense of five dollars per week, paid quarterly. The defendant conceded that that was a reasonable sum, and that the plaintiff was entitled to recover it with interest thereon, if entitled to recover at all. It appeared that the suit between Worcester and East Montpelier terminated in June, 1889, and the plaintiff's evidence tended to show that soon afterwards Milo Durfee learned of its termination.

The defendant controverted the contract between Worcester and Milo Durfee in respect to the time which the plaintiff claimed it was to continue, and introduced evidence tending to prove that it was for no specified time.

At the close of the evidence the defendant waived going to the jury on any questions except two, viz. : (1) Whether the town of Worcester made such a contract with Milo Durfee as the plaintiff claimed and its evidence tended to show, and (2) what the character of Daniel's removal to South Bur-

lington and of his subsequent stay there was, the defendant claiming that thereby he became and was a resident of that town, and was not a transient therein at the time that town assumed his support, and for that reason, if for no other, recovery could not be had; and the case was submitted to the jury accordingly.

No general verdict was returned, and three questions only were submitted to the jury, which, with the answers thereto, are as follows:

1. "Did the town of Worcester contract with Milo Durfee to pay him five dollars per week for supporting Daniel until the suit then pending between Worcester and East Montpelier was terminated, as the plaintiff's evidence tends to show? Answer. Yes."

2. "Did Daniel Durfee move from the town of Worcester to South Burlington in December, 1888, with the intent of residing at South Burlington as his home? Answer. No."

3. "Did Daniel Durfee at any time subsequent to June, 1889, and before December, 1890, intend to make South Burlington his home? Answer. No."

The court found all the things to be true that the plaintiff's evidence tended to prove concerning matters on which the defendant did not desire to go to the jury, and on such findings of the court and the special verdicts rendered judgment for the plaintiff for the amount claimed, to which the defendant excepted, and insisted that the judgment ought to be in its favor.

I. The plaintiff contends that the judgment of the county court in its favor can be sustained under the holding of this court in *Leicester v. Brandon*, 65 Vt. 544. Whatever may be said of the soundness of that decision, which was rendered by a divided court, it is clear that the case at bar does not come within the reasoning adopted by the court in that case. There, as reported, Brandon while supporting the pauper in Brandon, made arrangements with a person then residing in Leicester, by which the pauper was to be kept by him in the latter town, both parties reserving the right to have her re-

moved from Leicester at any time. While the pauper was being kept in Leicester under this arrangement she became chargeable to that town, and it was held that "in legal contemplation her actual residence was in Brandon, while she was transient in Leicester." In the case at bar the pauper was never kept in the plaintiff town with the consent nor by the procurement of the defendant. The special contract with Milo Durfee for the pauper's support terminated by its own limitation in June, 1889. As between the defendant and Milo Durfee, the defendant was not bound to follow the pauper to South Burlington and re-take him at the expiration of the contract. If Milo Durfee desired to charge the defendant with the pauper's further support, he should have returned him to it at the expiration of the contract. Under the facts stated, there was no implied contract on the part of the defendant to pay Milo Durfee for the support of the pauper. *Baldwin, Admr. of Milo Durfee v. Worcester*, 67 Vt. ; *Newton v. Waterford*, 67 Vt. . At the expiration of the special contract the pauper was of full age, and from June, 1889, to November, 1890, he, with the aid of his father, supported himself in South Burlington. Thus in law the pauper supported himself during this time. *Craftsbury v. Greensboro*, 66 Vt. 585. When he came to want in South Burlington he was not then being supported by the defendant, and hence the case does not fall within *Leicester v. Brandon*.

II. Daniel Durfee's home was always with his father. The father's home, wherever it was, was his home. He never had any other place he could call his home. When he moved from Worcester to South Burlington he left there no place nor home to which he had a right to return, nor did he leave any personal effects in Worcester. From June, 1889, to November, 1890, he resided with his father at that father's home in South Burlington, supporting himself within the meaning of the law. He was unmarried, and had no family of his own. It is true that usually intention is an important

element in determining the question of residence, but in this case the court below erred in its instructions to the jury, in making that question turn solely upon whether Daniel moved to South Burlington in December, 1888, with the intent of residing there, and whether subsequent to June, 1889, and before December, 1890, he intended to make South Burlington his home. It also erred in its instructions in respect to the pauper being transient as to Worcester subsequent to June, 1889. Under the undisputed facts as shown by the plaintiff's evidence, the jury should have been instructed that at the time the plaintiff assumed the pauper's support he was not transient in South Burlington, and that a verdict should therefore be returned for the defendant. *Fericho v. City of Burlington*, 66 Vt. 529.

The plaintiff does not contend that any part of its claim is covered by St. 1892, No. 55, but puts its right of recovery upon the ground that the pauper was transient under St. 1886, No. 42.

III. Against the exception of the defendant the plaintiff was permitted to show that Milo Durfee learned that the suit between Worcester and East Montpelier was terminated in favor of East Montpelier. This evidence was admitted as tending to prove that Milo Durfee thereafter kept the pauper under such circumstances as to constitute an implied contract on the part of Worcester to pay for such support.

Against the defendant's exception, and as tending to prove such an implied contract on the part of Worcester, the plaintiff was also permitted to show that Milo Durfee commenced suit against it, returnable to the September term, 1890, of Chittenden county court, to recover for the support of Daniel from the time of the termination of the suit between it and East Montpelier; that the death of Milo Durfee was suggested in the case at the April term, 1891, and his administrator entered to prosecute the suit, and that it was then pending.

The evidence had no tendency to prove an implied contract

on the part of Worcester, and it was error to admit it for that purpose. We must assume that the county court considered it for the purpose for which it was admitted, in finding the facts which it found, and from the judgment rendered it is to be inferred that it must have found that the pauper was kept after June, 1889, until Milo Durfee's death under such an implied contract, so that the case fell within the rule laid down in *Leicester v. Brandon*. If such a finding was made, there was no evidence to support it.

Judgment reversed and cause remanded.

G. D. BICKFORD v. TRAVELERS INS. CO.

MAY TERM, 1895.

*Accident insurance. Execution and delivery of policy.
Recovery under common counts. Must state
grounds of motion to dismiss. No recovery
after date of proof of claim. Juris-
diction of county court by rea-
son of amount involved.*

1. The plaintiff is not required to prove the execution of an accident insurance ticket on trial unless the defendant has, under county court rule No. 12, given notice that it will deny the execution.
2. The possession of the ticket by the plaintiff is evidence tending to show that it has been issued and delivered to him by the defendant.

3. The defendant objected to the admission of the ticket as evidence for the reason that no recovery could be had upon it under the general counts. *Held*, that the objection was properly overruled, for (a) a recovery may be had upon a conditional contract under the general counts, and (b) in this case there was a special count in indebitatus assumpsit upon this accident ticket, and it may be presumed, the contrary not appearing, that the recovery was upon this count only.
4. A party should state the precise grounds on which he bases his motion for a verdict, and if he does not, the trial court may well disregard it.
5. The contract of insurance in this case provided for an indemnity not exceeding twenty-six consecutive weeks, and that proofs of claim should be furnished within seven months from the date of injury. *Held*, that no recovery could be had for any period after the date of the final proof of loss.
6. *Held*, that it did not affirmatively appear that the plaintiff brought his suit to the county court in bad faith, and that, therefore, the defendant's motion to dismiss for want of jurisdiction by reason of the amount involved, was properly overruled.

Assumpsit. Plea, the general issue. Trial by jury at the September term, 1894, Orleans county, TYLER, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff claimed to recover upon a policy of accident insurance. Upon the trial he offered in evidence a paper purporting upon its face to be an accident ticket, the material part of which is as follows :

"The Travelers Insurance Company, of Hartford, Conn., hereby insures G. D. Bickford, of Barton, Vt., for the term fixed by the coupons still attached hereto, against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business ; or in event of death solely therefrom within ninety days, will pay the principal sum to his legal representatives ;

except that this ticket insures females against death only ; does not insure persons under sixteen or over seventy years old, employes on public conveyances while on duty, nor persons bereft of reason, sight or hearing ; covers only injuries received within the civilized limits of the United States, Canada, Newfoundland, Mexico, West Indies and Bermudas, including travel by regular passenger or mail lines on sea between such limits ; that the company's total liability hereunder shall not exceed three thousand dollars ; that its limit of insurance under accident tickets is six thousand dollars, with thirty dollars weekly indemnity, and it will return on demand to insured, or his legal representatives, all premiums paid in excess thereof. With above exceptions this ticket grants fifteen dollars per week indemnity for disabling injuries, three thousand dollars principal sum ; provided,

"2. Immediate written notice, with full particulars and full name and address of insured, is to be given said company at Hartford of any accident and injury for which claim is made. Unless affirmative proof of death or duration of disability, and of these being the proximate result of external, violent, and accidental means, is so furnished within seven months from time of accident, all claims based thereon shall be forfeited to the company. No legal proceeding for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all unless begun within one year from date of alleged accident.

"Rodney Dennis, Secretary. J. G. Battertan, President."

There were attached to the ticket two coupons, which extended the same for two days from the date punched out in the margin, which was January 6, 1893, twelve o'clock noon.

The defendant objected and excepted to the introduction of this ticket, for the reason that there was no evidence to show its execution, or that it had been issued and delivered to the plaintiff, and for the further reason that no recovery could be had upon the same under the general counts.

The declaration contained the ordinary common counts in assumpsit, and also contained the following special count :

"In a plea of the case, for that the defendant, heretofore, to wit, on the date of this writ, at Barton, in the county of Orleans, was indebted to the said plaintiff in the sum of five

hundred dollars, for money due to said plaintiff from said defendant upon an accident ticket issued by said defendant to said plaintiff on the sixth day of January, A. D. 1893, insuring said plaintiff against loss of time not exceeding twenty-six weeks; and in consideration thereof, the said defendant then and there undertook and faithfully promised the plaintiff to pay him, the said plaintiff, the sum so due as aforesaid when thereto afterwards requested.

"Yet though often requested, the defendant has never paid the same, but wholly neglects and refuses so to do."

The only pleadings filed by the defendant were the general issue. County court rule No. 12, which is referred to in the opinion of the court, reads as follows:

"If an action is founded on an instrument purporting to have been signed by the defendant, the plaintiff shall not be required to prove the execution of the same on trial unless the defendant shall have filed within the rule for filing special pleas a plea of the general issue, with a notice thereto appended that he shall deny the execution of such instrument.

"If handwriting is to be disputed in a case when the execution of a written instrument is put in issue by the pleadings, special notice thereof shall accompany the pleading raising such issue.

"This rule shall apply to pleas in offset, *mutatis mutandis*."

The plaintiff was injured January 7, 1893. Ten weeks from that date he executed and forwarded to the company proofs of claim which were duly received. Upon the trial the defendant insisted that the plaintiff could not recover for injuries after the date of this proof of claim, which was the only one filed by him, excepted to the admission of all evidence as to disability subsequent to that time, and requested the court to charge the jury that the recovery of the plaintiff must be limited to the sum of one hundred and fifty dollars. The court instructed the jury that they might give the plaintiff his actual damages which occurred after the filing of said proof, as well as before, and to this the defendant excepted.

At the close of the evidence the defendant moved for a verdict in its favor, and with reference to this motion the exceptions were as follows:

“At the close of all the evidence the defendant asked the court to direct a verdict for the defendant, upon the ground that no recovery could be had under the declaration as disclosed by the evidence, which is hereby referred to and made a part hereof, which motion was overruled, to which the defendant excepted.”

The defendant further moved the court to dismiss the suit, for that it had no jurisdiction as appeared from the evidence. This motion was overruled, and the defendant excepted.

The jury returned a verdict for the plaintiff in the sum of two hundred and ten dollars.

Crane & Alfred and *E. A. Cook* for the defendant.

The declaration of the plaintiff was in general assumpsit. Under this declaration the plaintiff could not recover upon the special contract set forth in the accident ticket. *Cutter v. Powell*, 2 Smith's Lead. Cas. 7th Ed. 61, 62; *Beede v. Fraser & Co.*, 66 Vt. 114.

If the cause of action as set forth originates in a contract, the contract must be proved as laid. *Way v. Wakefield*, 7 Vt. 223; *Wilkins v. Stevens*, 8 Vt. 214; *Wainwright v. Straw et al.*, 15 Vt. 215; *Matlocks v. Lyman & Cole*, 16 Vt. 113; *Stearns v. Haven et al.*, 16 Vt. 87; *Porter & Ballard v. Munger*, 22 Vt. 191; *Perry v. Smith*, 22 Vt. 301; *Kent v. Bowker*, 38 Vt. 148; *Groot v. Story*, 41 Vt. 533; *Doon v. Ravey*, 49 Vt. 293; *Bradley v. Phillips*, 52 Vt. 517; *Chapman v. Goodrich*, 55 Vt. 354; *State v. St. Johnsbury*, 59 Vt. 332; *Mann et al. v. Burchard et al.*, 40 Vt. 339.

Where a special contract contains conditions precedent, the performance of those conditions must be alleged in the declaration. *Donahue v. Windsor County Ins. Co.*, 56 Vt. 374; *Cooledge v. Continental Ins. Co.*, 67 Vt. 14; 1 Archibald's Nisi Prius, *133; 1 Saund., Pl. and Ev., *132; *Lamphre v. Cowen*, 42 Vt. 182.

There is no essential difference between the general counts

and the special count in this declaration; both proceed upon an absolute promise, while the promise proved was conditional. *Latham et al. v. Rutley et al.*, 2 B. & C. 20; *Strong v. Rule*, 3 Bing. 315.

W. W. Miles for the plaintiff.

The conditions in this contract do not modify the promise, but can be urged merely by way of defence. Hence, their performance need not be averred in the declaration. *Seyk v. Miller's Nat. Ins. Co.*, 74 Wis. 67; *Cooledge v. Continental Ins. Co.*, 67 Vt. 14; *Tripp & Bailey, Admr., v. Life Ins. Co.*, 55 Vt. 100.

The contract being for the payment of money, and having been fully executed upon the part of the plaintiff, a recovery may be had upon the common counts. 1 Chitty Pl. 342; *Way v. Wakefield*, 7 Vt. 223; *Wainwright v. Straw & Cunningham*, 15 Vt. 215; *Mattocks v. Lyman et al.*, 16 Vt. 113; *Bradley v. Phillips*, 52 Vt. 517; *Chaffee v. Rutland Rd. Co.*, 55 Vt. 110; *Bank of Columbia v. Patterson's Admr.*, 7 Cranch 299; *Sutton v. Bennett*, 1 Aik. 197; *Lapham v. Barrett*, 1 Vt. 247; *Stevens v. Talcott*, 11 Vt. 25.

The plaintiff was under no obligation to prove the execution of this instrument since the defendant had not denied it by its pleadings. County Court Rule No. 12.

The plaintiff may recover for damages subsequent to the filing of his proof. The object of requiring the furnishing of proof of claim is to establish the fact and nature of the injury. *DeGoff v. Queen's Ins. Co.*, 38 Me. 501; *Mut. Assur. Soc. v. Scottish U. & N. Ins. Co.*, 10 Am. St. R. 819; *Queens Ins. Co. v. Young*, 11 Am. St. R. 51; *McGlinchey v. Fid. & Cas. Co.*, 80 Me. 256; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432; *Teutonic F. Ins. Co. v. Mund*, 102 Pa. 89; *Burkhard v. Travelers Ins. Co.*, 102 Pa. 262; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405.

Even if the court is of the opinion that the plaintiff can only

recover for the ten weeks previous to the filing of his proof of claim, still the county court has jurisdiction, for it does not affirmatively appear that the suit was not brought in good faith. *Ladd v. Hill*, 4 Vt. 164; *Kitridge v. Rollins*, 12 Vt. 541; *Spafford v. Richardson*, 13 Vt. 224; *Cooley v. Aiken*, 15 Vt. 322; *Waters v. Langdon*, 16 Vt. 570; *Manwell v. Briggs*, 17 Vt. 176; *Henry v. Tilson*, 17 Vt. 479; *Brainard v. Austin*, 17 Vt. 650; *Joyal v. Barney*, 20 Vt. 154; *Sanborn v. Chittenden*, 27 Vt. 171; *Hall v. Wadsworth*, 28 Vt. 419; *Powers v. Thayer*, 30 Vt. 361; *Clark v. Crosby*, 37 Vt. 188; *Scott v. Moore*, 41 Vt. 205; *Field v. Randall & Durant*, 51 Vt. 33; *Worcester & Woodruff v. Lamson*, 55 Vt. 350; *Drown & Willard v. Forrest*, 63 Vt. 557.

TAFT, J. I. The first question presented is, whether the insurance ticket was admissible in evidence.

a. The first objection was that it "was clearly inadmissible until some evidence had been offered tending to show its execution, and issuing of said exhibit by said defendant." The plaintiff was not required to prove the execution of the ticket, as the defendant had filed no notice that he should deny it. County Court Rule No. 12. But it is urged that, in order to make the ticket admissible, some evidence ought to be given tending to show its issuing and delivery. The possession of the ticket was *prima facie* evidence, presumptive proof, and therefore evidence tending to show that the ticket had been legally issued and delivered.

b. The other objection made to the ticket as evidence was "that no recovery could be had upon the general counts, by reason of the provisions contained in the contract as expressed in said exhibit." It is argued that the declaration is upon an absolute contract, while the one in proof is conditional. The objection was not that the ticket was inadmissible because the proof varied from the declaration, but that for the reason

no recovery could be had under the general counts. This does not raise the question of variance between the proof and declaration, but simply whether a recovery can be had under the general counts upon a conditional contract. The fact that a contract is conditional is no reason why a recovery under the common counts cannot be had, the case being otherwise made out. There is another reason why this objection is not valid. There is in the declaration a special count in *indebitatus assumpsit*, and the verdict is general. Conceding that no recovery can be had under the general counts, a judgment is never arrested because the declaration contains a defective count, if there is a good count in it for the same cause of action; the verdict is deemed the finding upon the good count only, unless it otherwise appears. R. L., s. 913. It does not so appear, and the exception is not sustained.

II. "The defendant asked the court to direct a verdict for the defendant, upon the ground that no recovery could be had under the declaration as disclosed by the evidence." It was not error to refuse a compliance with the request. When a party moves for a verdict he should state the precise grounds on which he bases his request, or the court may well disregard it. *State v. Nulty*, 57 Vt. 543. No ground was stated, and the principle stated in the case cited controls the question.

III. The next question is, whether the plaintiff can recover for disabling injuries after the filing of his proof. The injury occurred January 7, 1893; the proof was filed at the end of ten weeks thereafter; the limit of time for which the plaintiff could recover was twenty-six consecutive weeks; and he had, by the terms of his contract, seven months from the time of the accident to file the proofs of the duration of his disability, i. e., he had one month after the time for which he could recover had expired in which to file the proof of his claim; unless he filed his proof within seven months of the time of the accident, he forfeited all claims under the con-

tract. A fair interpretation of the contract requires us to hold that no recovery can be had for a disabling injury for any time not covered by the proofs. The insured is not required to file his proof until the twenty-six weeks for which, if the facts warrant, he can recover, have expired; he then is aware of all the facts in the case, and can make his proof and claim accordingly. There is nothing in the contract that expressly forbids making two or more proofs of claim. The precise point we decide is, that no recovery can be had for any time after the final proof of a claim has been filed; the limit of recovery in this case was one hundred and fifty dollars, and interest after the receipt of the proofs by the company, which we consider to have been March 28, 1893, and the judgment below should have been for that sum.

IV. The remaining question is one of jurisdiction; in order to oust the county court of jurisdiction, it must affirmatively appear that the plaintiff did not bring his suit in good faith. The defendant claims that it is apparent that such is the fact, for that the plaintiff testified "I did not suppose I was entitled to anything after I told them what I would take; made my claim." It does not appear that this was all the evidence upon this point, nor that it referred to the time the suit was begun; he may have supposed at the time he made his claim that he would not be disabled thereafter, or that he could not recover for any time thereafter. The plaintiff is not, as matter of law, by testifying as above stated, estopped from making the claim that he brought his suit in good faith, and as it does not affirmatively appear that it was brought in bad faith, the court had jurisdiction, and the motion to dismiss was properly overruled. *Drown v. Forrest*, 63 Vt. 557.

If the plaintiff enters a remittitur of the damages, in excess of the sum which we think he was entitled to recover, as above stated, the judgment may be affirmed; otherwise the exception is sustained, judgment reversed, and cause remand-

ed for a new trial. The plaintiff having filed in court a remittitur of the damages in excess of one hundred and fifty dollars, and interest since March 28, 1893,

Judgment is affirmed, and the defendant allowed its costs in this court.

WARREN C. FRENCH v. W. A. OSMER.

JANUARY TERM, 1895.

Conditional sale. Remedies of vendor. Act No. 93, Acts of 1884.

1. No. 93, Acts of 1884, providing that in case of the conditional sale of personal property the vendee may, after thirty days from condition broken, cause the property to be sold at public auction by a public officer, does not alter the nature of the vendor's title in the property, and he may still pursue any remedy in respect to the property as before the passage of that act except that in taking and selling it he must follow the statute.
2. So the vendor may maintain an action on the case against the bailee of the vendee for an injury to the property after thirty days from condition broken.
3. That the bailee has settled with the vendee for such damage is immaterial.
4. *Roberts v. Hunt*, 61 Vt. 612, and *Smith v. Wood*, 63 Vt. 534, explained.

Case for the negligence of the defendant. Plea, the general issue. Trial by court at the February term, 1893,

THOMPSON, J., presiding. Upon the facts found the court gave judgment for the plaintiff. The defendant excepts.

The plaintiff claimed to recover for damages to his buggy wagon occasioned by the negligence of the defendant.

June 25, 1891, the plaintiff sold the wagon in question to one Caswell, and took his note therefor, payable on demand. The note was secured by a vendor's lien upon the wagon, which was duly recorded. In March, 1892, the wagon being in the possession of Caswell, his wife loaned it to the defendant, and while the defendant was using it the wagon was damaged. The plaintiff claimed that this damage was occasioned by the negligence of the defendant in the management of his horse, and the court so found.

Caswell, at the time the wagon was injured, was indebted to the defendant in a considerable sum, and it was agreed between them that the amount of the damages to the wagon was five dollars, and that the defendant should credit Caswell with this amount. The defendant had never paid the amount of the damages, unless this was a payment. The plaintiff knew nothing of this arrangement, and never consented to it.

Norman Paul for the defendant.

No. 93, Acts of 1884, essentially changes the relation of the parties in case of a vendor's lien. Since the passage of that act the vendor's only remedy at law is to proceed by sale of the property under the statute. *Roberts v. Hunt*, 61 Vt. 612; *Smith v. Wood*, 63 Vt. 534.

When a statute provides a new remedy, that supercedes all others. *Calkins v. Clement*, 54 Vt. 635; *Brattleboro v. Wait*, 44 Vt. 459; *Spaulding v. Barnes*, 4 Gray 330.

French & Southgate for the plaintiff.

The title to this property continued in the plaintiff. *Church, Admr., v. McLeod*, 58 Vt. 541.

Since the plaintiff was the general owner of the property, he might maintain an action on the case against the defendant for its injury. Chit., Pl., 71, 147, 167, 191, 195; *Higgins v. Farnsworth*, 48 Vt. 512.

ROWELL, J. This case has been twice argued and much considered, and this is the first time we have been able to dispose of it. The question is, whether the vendor of personal property sold conditionally with a lien reserved thereon seasonably recorded can maintain an action on the case against the purchaser's bailee thereof for injuring the same after thirty days from the time of condition broken. To decide this question it is necessary to determine the nature and extent of the interest that such a vendor has in the property. Before any legislation on the subject this was not doubtful, for the court had repeatedly held that full payment of the price was a condition precedent to the vesting of title in the vendee, and that until such payment the vendor was the sole owner of the property, with an absolute right of possession on condition broken, the vendee not having even an attachable interest therein, and the vendor having a right to recover the full value thereof for a conversion. In 1854 an act was passed whereby the vendee's creditors could attach the property and discharge the vendor's claim thereon by payment; but this act did not otherwise affect the vendor's rights. Subsequently statutes were passed that such sales should not be valid against attaching creditors and purchasers without notice unless the vendor took a written memorandum thereof, and caused it to be recorded in the town clerk's office within a certain time. But the contract was valid between the parties without such memorandum. Thus the law stood when the act of 1884 was passed. That act relates to the removal of the property from the state, to the discharge of the lien thereon, and to the sale thereof by the vendor, and provides, among other things, that after thirty days from the time of condition broken, the ven-

dor may cause the property to be taken and sold at public auction by a public officer as therein prescribed. It is claimed that this statute alters the title that the vendor theretofore had to the property, and makes him a mere security-holder, standing as he would if he held a statutory chattel mortgage; that the interest of the vendee is that of ownership, modified only by the vendor's right to realize his claim from the property in the manner provided by the statute; that this court has held as much in *Roberts v. Hunt*, 61 Vt. 612, and *Smith v. Wood*, 63 Vt. 534; and that therefore this action could not be maintained against the vendee, and consequently not against the defendant, his bailee. But a majority of the court think that this is not the effect of the statute. The provision under consideration relates to nothing but a sale of the property. If the vendor wishes to sell, he must proceed according to the statute instead of according to the common law, as he could before. This is the scope of the cases referred to, in both of which the vendors took and sold the property contrary to the statute, for which they were held liable. What is said in those cases about a remedy under the statute being the only remedy the vendor has, must be taken to mean the only remedy he has for selling the property, and not that he has no other remedy for any purpose. *Roberts v. Hunt* expressly recognizes that he is still the general owner, but with a special property in the vendee, coupled with a right of possession for thirty days after condition broken. But that special property does not take the title out of the vendor and put it into the vendee, and relegate the vendor to the position of a mere security-holder, for that would do violence to the contract, which provides that the title shall not pass till the price is fully paid, and the contract must be given effect. In law the contract is, as Mr. Justice Bradley puts it in *Harkness v. Russell*, 118 U. S. 666, a mere agreement to sell on a condition to be performed, and

not an absolute sale with the reservation of a lien or mortgage to secure the purchase money.

In *Ballard v. Burgett*, 40 N. Y. 314, Grover, J., styles such an agreement an executory contract that the title shall pass on the happening of the stipulated event, namely, payment of the price. Mr. Story distinguishes it from a purely executory contract in this, that an executory contract is absolutely to sell at a future time, while a conditional contract is conditionally to sell. In the one case, he says, the performance of the contract is suspended, and deferred to a future time; in the other, the very existence and performance of the contract depends upon a contingency. Story, Cont. s. 246. But however this is put, it is considered by the majority that the vendor's title is precisely the same in legal nature that it was before the passage of the statute, and that the remedies adapted to the enforcement of his rights remain to him the same as before, except so far as they are superceded by the statute, and that they are not thus superceded to the extent of taking away the remedy here resorted to, if such a remedy ever existed, of which there can be little doubt. In Massachusetts a conditional vendee is called a bailee for a specific purpose, and only a bailee; *Coggill v. Hartford & New Haven R. R. Co.* 3 Gray 547; and is allowed to recover the full value of the property for a conversion after the vendor's right of possession has attached, on the ground that he stands in the position of a bailee answerable over. *Harrington v. Russell*, 121 Mass. 269. Although the vendee may not be strictly a bailee, we think he is properly classed as standing in the position of a bailee, which places the vendor in the position of a bailor. Standing thus, each can maintain all the rights that the law has thus far accorded to them, and their position is fairly well defined.

At the time in question the wagon was rightfully in the possession of the vendee, and no question is made but that

the plaintiff's interest therein was then reversionary if he is not regarded as a mere security-holder, as claimed; and it is clear that for injury to such an interest an action on the case is the proper remedy, both against a bailee and against third persons.

The defendant's paying to the vendee by crediting him on account the amount they agreed upon as damages, does not bind the plaintiff, for that was a disposition of the plaintiff's property without his consent for the benefit of the vendee, which the latter had no authority to make.

Judgment affirmed.

JOHN EASTMAN v. SAMUEL P. CURTIS.

JANUARY TERM, 1895.

Master and servant. Falling elevator. Contributory negligence. Duty of master to provide safe machinery.

1. Where a party by his requests to charge suggests the use of a word, he cannot afterwards except to its use in the sense suggested.
2. *Held*, that the use of the phrase "risks that are due to the master" was not, in view of the context of the charge, error as being too indefinite.
3. Where there is evidence in the case of contributory neglect, the court is, upon request, bound to instruct the jury upon that subject.

4. The plaintiff was injured by the falling of the defendant's elevator. The jury was told that "the plaintiff, being the employee, was not bound to inspect the elevator, but had a right to rely on the defendant having put in a proper elevator for his use." *Held*, correct as applied to the facts in this case.
5. *Held*, that the evidence of the plaintiff tended to show negligence in the defendant.

Case for the negligence of the defendant. Plea, the general issue. Trial by jury at the September term, 1893, Rutland county, TYLER, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The evidence on the part of the plaintiff tended to show that the defendant was a dealer in flour, feed, coal, baled hay and grain, on Evelyn street in the village of Rutland; that the plaintiff had worked for the defendant in and about his store about nine years, and had quit that employment on or about the first day of January, A. D. 1891; that about the middle of October, 1891, the plaintiff again entered into the employment of the defendant temporarily, and that during the interval while the plaintiff was not in the employ of the defendant, the roof of the store building had been raised so as to make the building three stories high instead of two, and that a hand elevator had been put in for raising and lowering freight from one floor to another, and that an opening had been cut in the three floors of the building, so that the platform or car of the elevator passed freely from the basement or cellar to the third floor; that the weight of the car was balanced by a weight of iron that ran in a box from the cellar, and said weight and car were connected together by a wire rope running over a sheave wheel; that upon the shaft with said sheave wheel was a spur wheel, that was geared into a pinion wheel; that upon the same shaft with the pinion wheel was the large wheel over which passed a rope, and by pulling upon this rope the elevator car was moved up and down; that the rope by which the machine

was worked passed through the floor some eight or ten inches from the edge of the opening through which the car moved; that in letting down loads from the upper floors the descent of the load was controlled by a brake, which was applied to the outer circumference of the same wheel that the rope acted upon, and this brake was controlled by a rope attached to one end of the brake, and passing down through the three floors.

The plaintiff also introduced evidence tending to show that after he had been at work there on the last occasion about six weeks, on the twenty-seventh day of November, 1891, the plaintiff received an order in the afternoon for five barrels of flour that were on the upper or third floor of the building, and that the plaintiff and Herbert E. Curtis, a son of the defendant, and Luke Kelley went up to the third floor to get the flour; that they put the five barrels of flour upon the elevator; that young Curtis and Kelley got upon the elevator with the flour and started it down, leaving the plaintiff standing on the floor; that after the elevator started down some four or six inches, the plaintiff put his hands on the chime of one of the barrels and stepped upon the elevator; that as the plaintiff stepped upon the elevator young Curtis cried out that the rope was breaking, and the elevator with the five barrels of flour and the plaintiff and Kelley fell or ran rapidly to the bottom of the cellar and struck with great force, and the plaintiff received the injuries for which his suit is brought; that young Curtis was left hanging by the brake rope.

The evidence of the plaintiff further tended to show that when he went back to work for the defendant in October, 1891, the elevator was in operation, and that the plaintiff in connection with the other men in the store used it from day to day, and that the plaintiff oiled it as it needed such care, and that all the machinery and gearing was open to view and could be seen from the floor, and in oiling it the

plaintiff had to go up to where the gearings were. The plaintiff further testified that he was not a mechanic, and had had no experience with machinery.

The plaintiff introduced various men accustomed to the building and use of machinery, whose testimony tended to show that the machinery was too light for the use to which this elevator was put, and that it was not properly set, in that the arbors upon which the various wheels were attached were out of level, and the bearing too far from the wheels; and the gear of the spur wheel and the pinion wheel worked loosely. Witnesses were also introduced who testified that while the plaintiff was confined to his bed the defendant visited him, and remarked that he was sorry that the plaintiff was hurt, and sorry he did not have the elevator tested, as it might have prevented the accident, and that he made the same remarks on other occasions.

The testimony on the part of the plaintiff further tended to show that after the accident two cogs or teeth were broken on the spur wheel, and the spur wheel itself broken, and two or three cogs on the pinion wheel, and that the wire rope connecting the elevator with the weight or counterpoise was broken.

The testimony of the plaintiff further tended to show that although said elevator was designed for the transportation of freight and merchandise from floor to floor, that the defendant had not given him any caution or warning about riding upon it, and that it was the habit and custom of the plaintiff and the other employes and the customers of the store to ride up and down upon the elevator, and that the defendant had knowledge of such custom, and that upon one or more occasions the defendant himself had rode up and down upon the elevator. The plaintiff also testified that when he went to work the stairs from the second to third floors were not there, but that they were put in a few days before the accident. The testimony of plaintiff

further tended to show that in absence of defendant, his son Herbert had charge of the business at the store when he was there, and that he was foreman and manager.

The evidence on the part of the defendant tended to show that said elevator was designed to be operated from the floor, and was for the transportation of merchandise only, and was not a passenger elevator; and that while it could be operated by a person standing upon the platform of the car, it was at great disadvantage, and could be much more readily done from the floor. The defendant further testified that the elevator was of an improved pattern—one in common use, and that he purchased it of reputable dealers, who placed it in position ready for work, and that the dealers sent skilled mechanics for the purpose of putting it in place; that after it was ready for delivery, and acceptance by the defendant, a load of eight barrels of flour, which was larger than any loads he should be liable to want to use upon it, was put on it, and run up and down several times in his presence, and that so far as he could see the elevator was a perfect machine and worked well; that within two or three days after the elevator was completed the defendant stepped upon it, and rode to the upper floor; that just before he reached the floor, he reached over to take hold of the brake rope for the purpose of stopping it, and caught one toe between the elevator and floor, and was thrown off and badly injured. That he had no one to take charge of his business, and after being confined to his house for a day or two, sent for the plaintiff and engaged him to take charge of the business at the store; that the plaintiff was a good workman (a fair mechanic) and a man of more than ordinary observation and experience, and that while talking with him about said employment, the defendant said to the plaintiff that he must be careful in the use of the elevator, as his experience had shown him that it was not a good thing to stop with his foot, and that men better be told

not to ride upon it, and that the defendant directed the plaintiff to take charge of the business at the store, and direct the other men in their duties.

The defendant denied having said to the plaintiff, or in his hearing, that he was sorry the elevator had not been tested, and said that he considered the operation of it by the mechanic who put it in as a sufficient test for all practical purposes, but that he did say that he was sorry that the plaintiff was injured.

The defendant also introduced expert mechanics, who had examined the elevator since the injury, and who testified to its sufficiency, and gave their opinion as to the manner of the accident; and their testimony tended to show that the breakage of cogs upon the spur wheel and the pinion wheel, and of the rope aforesaid, all took place at the time the elevator struck the bottom of the cellar, and that none of them were broken until that time.

The evidence on the part of the defendant further tended to show that at the time of the accident the plaintiff and the other men named by him were upon the upper floor, and when the flour was loaded the plaintiff started to walk down the stairs; that Mr. Kelley called out to him to come back and ride down upon the elevator; that the plaintiff replied that he dare not do it, but, upon being challenged to come back, did come back, and got onto the elevator, and that it was started down; that the three persons upon it were laughing and talking and joking, and that by reason of the load and the brake being thrown off suddenly and not applied to regulate it, it ran with great rapidity, or fell, to the bottom of the cellar, where the injury to the plaintiff occurred. Herbert Curtis also testified that when he was left hanging on the rope at the time of the accident he went down the rope to second floor, and swung off onto that floor.

At the close of the evidence the defendant moved the court

to direct a verdict. The motion was overruled, and the defendant excepted.

The opinion states the facts material to the other exceptions.

J. C. Baker for the defendant.

The plaintiff assumed the ordinary and visible risks attendant upon the use of this elevator, and there were no others, since every part of it was simple and exposed to view. *Rooney v. Cordage Co.*, 161 Mass. 153; *Kleinst v. Kemhardt*, 160 Mass. 230; *Moulton v. Gage*, 138 Mass. 390.

For this reason the court should have directed a verdict for the defendant. *Ragan v. Railway*, 97 Mich. 265; *Railroad v. State*, 75 Md. 152; *Daniels v. Railroad*, 36 West Va. 397; *Worthington v. Railroad*, 64 Vt. 107; *Dumas v. Stone*, 65 Vt. 442.

The use of the word "contract" in the charge was clearly misleading. There was no contract in this case between plaintiff and defendant. *Carbine v. Railway*, 61 Vt. 348; *Latremouille v. Railway*, 63 Vt. 336; *Rooney v. Cordage Co.*, 161 Mass. 153.

The court should have instructed the jury on the subject of the plaintiff's contributory neglect. *Willard v. Pinard*, 44 Vt. 34; *Westmore v. Sheffield*, 56 Vt. 239; *Donahue v. Ins. Co.*, 56 Vt. 374.

The charge of the court, that the plaintiff was not bound to inspect the elevator, was erroneous in this case, for the whole machine was open to the plaintiff's observation, and while not bound to seek out hidden defects, he was bound to see what was before his eyes. *Wagner v. Chemical Co.*, 147 Penn. St. 475; *Wormell v. Railroad*, 79 Me. 397; *Kcan v. Rolling Co.*, 66 Mich. 277; *Gibson v. Railway*, 63 N. Y. 449; *Kohn v. McNulty*, 147 U. S. 238; *Davis v.*

Railroad, 152 Penn. St. 314; *Fisk v. Railroad*, 72 Cal. 38; *Light Co. v. Murphy*, 115 Ind. 566.

George E. Lawrence and *Butler & Moloney* for the plaintiff.

The exception of the defendant to the failure of the court to comply with his requests, and to the charge of the court on the subject of those requests, is too vague and general. *Goodwin v. Perkins*, 39 Vt. 598; *Knight v. Smythe*, 37 Vt. 520; *State v. Nulty*, 57 Vt. 543.

The plaintiff was not bound to inspect this elevator, and the charge to that effect was correct. *Wood, Mas. & Ser.*, p. 763, s. 376; *Muldowney v. Railroad Co.*, 36 Iowa 462; *Shear. & Redf., Neg.*, s. 217; *Porter v. Hannibal & C. Rd. Co.*, 71 Missouri 66.

THOMPSON, J. I. The motion to direct a verdict for the defendant was properly overruled, as the evidence introduced by the plaintiff tended to show a cause of action.

II. Among other things the court below instructed the jury that

"If the defendant had no actual notice of defects in the machine, and no actual fault existed on his part, then there is no contract or undertaking on his part that the machine was free from defects, or that it could be safely used by the plaintiff. If there was no contract or undertaking on his part that the machine could be safely used by the plaintiff, the plaintiff must be taken to have assumed the risk of such defects as were not visible to the defendant, or which with reasonable care ought to have been discovered by him. The servant assumes those risks which are ordinarily incident to his employment, but he does not assume those risks that are due to the master or employer, unless he has or ought to have known of them himself."

The defendant contends that there was no evidence tending to show any contract between the plaintiff and the

defendant that the elevator could be safely used, and that therefore the use of the word "contract" in this part of the charge misled the jury. This instruction to the words "If there was no contract" is almost a literal compliance with the defendant's third request to charge, in which he uses the word "contract" in the same sense in which it is used by the court. Having put it into the mouth of the court by his request, the defendant cannot now be heard to say that its use was error. *Foster's Exrs. v. Dickerson*, 64 Vt. 233; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384; *Minott v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685.

It is also claimed that there is error in this instruction, in that the words "risks that are due to the master" are too indefinite to convey any idea to the ordinary jurymen. There can be little doubt but that the learned judge intended to say, and perhaps said, that

"The servant assumes those risks which are ordinarily incident to his employment, but he does not assume those risks that are due to the *neglect* of the master or the employer, unless he has or ought to have known of them himself."

But taking the language as it stands in the exceptions, the phrase "risks due to the master" is not open to the objection urged. From the context it is clear that it was used, and must have been understood in the sense of those risks that belong to the master—that rest upon him. The court had fully and clearly instructed the jury in respect to the duty of the master to furnish safe appliances for the use of the servant while engaged in the master's service.

III. The evidence of the defendant tended to show that contributory negligence on the part of the plaintiff at the time of the accident was a proximate cause of his injury. By his twelfth request the defendant specifically asked the court below to charge upon that subject, but by some inadvertence it omitted to do so, to which the defendant ex-

cepted. He was entitled to have the jury properly instructed on this subject, and in the failure to do so there was error.

IV. The jury was instructed that

"The plaintiff, being an employee, was not bound to inspect the elevator, but had a right to rely upon the defendant having put in a proper elevator for his use."

The defendant admits that under some circumstances this charge would be correct, but contends that in this instance it is erroneous, because it is not appropriate to the evidence.

The defendant testified in substance that sometime prior to the plaintiff's injury, the defendant injured one of his feet while operating the elevator, and in consequence of this injury was unable to attend for some time to his business carried on in his store, and on that account employed the plaintiff to work in the store; and that when he engaged him he told him that he wanted him to take the entire charge of the business, and see that it went right until he was able to be out, and that plaintiff said he would do so. Prior to the time plaintiff was injured the defendant was able to be out again, and at the time of the injury he was in the store at work in his office. If under his employment, according to the defendant's version of it the plaintiff was vice-principal until the defendant was able to be out, and during that time, as between himself and his principal, was bound to use ordinary diligence, skill and judgment in inspecting the elevator to see that it was in a fit condition for use, yet that duty ceased when the defendant was able to be out, and the plaintiff thereby ceased to be vice-principal. The evidence of the plaintiff tended to show that he was not at any time in charge of the business, but that he was all the time simply an ordinary servant. No evidence was introduced tending to show that the accident occurred on account of the failure of the plaintiff to inspect the elevator during the time the defendant claimed he was vice-principal. Whether the plaintiff entered upon his employment as an ordinary ser-

vant or as vice-principal, he had a right to assume at the time he commenced work that the elevator was reasonably safe, and fit for the use to which it was to be put. The defect in the elevator, if there was any, was claimed to be in the manner in which it was constructed. It is not claimed that either the master or servant actually knew of such a defect prior to the accident. The evidence of the defendant shows that he, knowing all the circumstances attending the construction of the elevator, and the putting it into the store, did not believe any defect nor danger existed. The evidence standing as it did on this phase of the case, it is within the doctrine laid down in *Dumas v. Stone*, 65 Vt. 442, and *Houston v. Brush & Curtis*, 66 Vt. 331, and it was not error for the court below to give this instruction.

This disposes of all the points made in argument.

Judgment reversed and case remanded.

PHELPS B. SMITH'S EXR.

v.

NANCY M. SMITH, APT.

OCTOBER TERM, 1893.

Will. Undue influence. Circumstantial evidence may establish. Habit of intoxication.

1. While it must appear, in order to avoid a will upon that ground, that the undue influence operated upon the very act of making the will, that fact need not be established by direct testimony, but may be inferred from circumstances, although opportunity alone upon the part of the person to be benefitted is not enough.
2. *Held*, that the circumstances in this case tended to show undue influence.
3. It appeared that the testator had been for some time habitually addicted to the excessive use of intoxicating liquor. The evidence of the proponent tended to show that shortly before the execution of the will the testator drank some whiskey, but was comparatively sober and rational at the time, while the testimony of the contestants tended to show that he was so drunk that he knew nothing. *Held*, error to instruct the jury that they were not to consider the habits of the testator as to intoxication in determining his condition at that time.

Appeal from a decree of the probate court for the district of Addison establishing the will of Phelps B. Smith. The contestant pleaded undue influence and mental incapacity. Trial by jury at the June term, 1892, Addison county, TAFT,

J., presiding. Verdict that the instrument is the will of Phelps B. Smith. The contestant excepts.

The contestant claimed that her evidence tended to show undue influence. The court declined to submit this issue to the jury, and the contestant excepted.

The contestant also excepted to the charge of the court that the previous habits of the testator as to the excessive use of intoxicating liquor had no bearing upon the question whether he was intoxicated at the time he executed the will.

The facts upon which these exceptions arise appear in the opinion.

Henry Ballard and Stewart & Wilds for the contestant.

The question of undue influence should have been submitted to the jury. *Sessions v. Newport*, 23 Vt. 9; *Jones v. Booth*, 10 Vt. 268; *Wemet v. Lime Co.*, 46 Vt. 458; *Fairbanks v. Nelson*, 56 Vt. 657; *Witcher v. Peacham*, 52 Vt. 242; *Smith v. Franklin*, 61 Vt. 385.

Direct evidence of undue influence was not necessary. *Reynolds v. Root*, 62 Barb. 250; 1 Red., Wills, 528.

W. H. Bliss, W. P. Dillingham, and E. R. Hard for the proponent.

There is no presumption of undue influence from the fact that one of the legatees wrote the will, even as to that legacy. 1 Wms. Exrs., (6th Am. Ed.) 112, 113; *Barry v. Bullin*, Curt. 638; 2 Moore P. C. 480; *Darling v. Loveland*, 2 Curt. 225, 227; *Jones v. Goodrich*, 5 Moore P. C. 16; *Mitchell v. Thompson*, 6 Moore P. C. 137; *Browning v. Budd*, 6 Moore P. C. 430; *Greenville v. Tylee*, 7 Moore P. C. 320; *Souler v. Plowright*, 10 Moore P. C. 440; *Keogh v. Barrington*, Cas. Temp. Napier 1; *Smith v. Goodacre*, L. R. 1 P. & D. 359; *McKnight v. Wright*, 12 Rich. (S. C.) 247; *Bancroft v.*

Otis, 91 Ala. 279; *Chandler v. Fost*, (Ala.), 11 So. Rep. 636; *Carter v. Dixon*, 69 Ga. 82; *Downey v. Murphy*, 1 Dev. & Bat. 82; *Griffith v. Diffenderfer*, 50 Md. 466; *Sterling v. Sterling*, 64 Md. 138; *Cramer v. Crambaugh*, 3 Md. 491; *Montague v. Allan*, 78 Va. 592; *Armstrong v. Armstrong*, 63 Wis. 162; *Dale v. Dale*, 36 N. J. Eq. 269; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Coffin v. Coffin*, 23 N. Y. 9; *Tyler v. Gardiner*, 35 N. Y. 559, 593; *Cudney v. Cudney*, 68 N. Y. 148.

The jury ought not to have been permitted to consider the habits of the testator as bearing upon his condition when the will was executed. 1 Wms. Exrs., (6th Am. Ed.) 41, 42; *Andress v. Weller*, 2 Green. Ch. (N. J.) 604, 608; *Handley v. Stacey*, 1 F. & F. 574; *Duffield v. Morris*, 2 Harr. 375; *Peck v. Cary*, 27 N. Y. 9, 17; *Van Wyck v. Brasher*, 81 N. Y. 260, 262.

MUNSON, J. To establish the invalidity of a will on the ground of undue influence it must be made to appear that the influence was exerted upon the very act of making the will, and that it was such as to induce the testator to act contrary to his wishes, and to make a disposition of his property which he would not have made if left entirely to his own judgment. *Foster's Exrs. v. Dickerson*, 64 Vt. 233. The law does not permit this undue influence to be inferred from the mere fact that one who is to profit by the instrument had an opportunity to impress his will upon the mind of the testator. There must be some evidence tending to show that an undue influence was actually exerted. But the fact of its exercise may be found without the aid of direct testimony. It follows that when there is evidence of circumstances which have a legitimate tendency to prove that undue influence was used, the case must be submitted to the jury.

The testator's mother and a daughter eight years of age

were his only lineal relatives at the time the will was made. His father and his wife had died about a year before that time. The testator had been engaged in settling his father's estate, and had been assisted therein by Cyrus Smith, a cousin, and D. H. Bennett, a second cousin—the beneficiaries of his will who are claimed to have unduly influenced its making. The testator had used intoxicating liquor freely for nine years, and had for some time been a confirmed drunkard. Witnesses differed widely as to the effect produced upon him by this habit. For the purposes of our inquiry the testimony most favorable to the contestant must be taken to be true. According to this, the testator's nervous system was broken down, his mind and memory seriously impaired, and his will power weakened. He had become unlike his former self in demeanor, and apparently in character. He was vulgar and profane in the presence of his mother and daughter. He sometimes threatened suicide when morose and despondent from the effects of drink. He was under the immediate influence of liquor the greater part of the time for several weeks before the will was executed.

Cyrus Smith, the residuary legatee, was a near neighbor of the testator, a frequent visitor at his house, and a friend whom he had long been accustomed to consult concerning his general business. Smith had interviews with the testator at the testator's house on fourteen days during the six weeks preceding the execution of the will, which he testified were concerning the business of the father's estate. The last of these occasions was two days before the will was executed, at which time he was alone with the testator about an hour. In pursuance of a request made at this interview, he went to the testator's house the day the will was executed, and was then advised with by the testator in regard to some papers which he wished to execute on that occasion, and did execute before signing the will. Although at the house, Smith was not present when the will was signed, having left

the room a few minutes before, for what reason he was unable to state, unless it was because he supposed that the testator's will was to be executed.

The will was drawn, and its execution attended to by D. H. Bennett, the other legatee mentioned. About a month before this the testator had executed another will drawn by Bennett, which the proponent's evidence tended to show was prepared from memoranda dictated by the testator, and executed without any attempt at secrecy. That will was the same as the succeeding one, except that it contained a considerable cash legacy to a female domestic. The testator afterwards concluded that it would be better to pay her the amount of this legacy and execute another will. Just before the second will was executed, the testator and Bennett went into another room and remained there alone a few minutes, during which time, according to proponent's testimony, the testator read the will. The execution of the will was attended with some secrecy, all the talk in regard to it being in a tone scarcely above a whisper. The proponent's testimony tended to show that this caution was observed because of the testator's desire to keep the proceedings from the knowledge of the domestic above referred to.

The testator and his mother had always lived together, and his mother had recently had the charge of his daughter. The mother was sixty-one years of age, and had property of the value of twenty-five thousand dollars. They had all lived at Vergennes during the preceding winter, but had returned to the testator's home the last of March, and were there when the first will prepared by Bennett was executed. In the latter part of April the mother took the daughter back to Vergennes to attend school, and remained there with her until shortly before the instrument in suit was executed, when she returned home for a brief stay. Bennett saw her at the house when he was making preparations for the first will, and both Bennett and Smith saw her there the day the

second will was executed. She had long had a friendly acquaintance with them both. Bennett testified that he talked with her about the legacy to himself when the first will was being prepared, and Smith testified that he had a conversation with her about the execution of the second will the day it was signed. The mother testified that no such conversations were had, and that she knew nothing about the execution of either will, nor of her son's purpose to have Bennett prepare a will, until after the testator's death.

According to this testimony the testator's mental condition was such that he could be easily influenced. His reliance upon the beneficiaries in other matters would make him especially susceptible to influence from that quarter. They had every opportunity—the one as draftsman of his will, and the other in repeated interviews—to exert an influence upon him. While the testator's conduct in the presence of his daughter indicates that his habits had dulled his sense of parental responsibility, there is nothing to show, and the age of the daughter would forbid the inference, that anything had occurred to lessen such natural affection for her as his impaired sensibilities were capable of. The will, while not extremely adverse to the daughter's interest, is not in the line which is ordinarily dictated by a father's affection for his only child. It was executed with all the secrecy it was possible to observe when transacting the business at the testator's house. The jury would not have been bound by the proponent's explanation of this secrecy, and might have observed in the manner of the witnesses a sufficient reason for disregarding their statement. Laying this explanation aside, the case is not without circumstances which indicate that the secrecy was designed to keep the testator's mother in ignorance of his action. If the secrecy was practiced against her, it was practiced not merely against the testator's mother, but against the person who was by force of circumstance the natural protector and guardian of his child. Both the per-

sons benefitted at the expense of the daughter were fully cognizant of the mother's position and responsibility in regard to her. The jury might have believed the mother's testimony that nothing was said to her about the matter by Smith or Bennett, and if they believed that the beneficiaries had intentionally falsified in regard to this, the fact that they had done so would have had a bearing upon the question raised in regard to them. We think it cannot be said that there was no evidence tending to show the exercise of undue influence.

The proponent's testimony tended to show that the testator drank some whiskey shortly before the will was executed, but that his condition was such that he could walk naturally and converse rationally. The contestant's testimony tended to show that the testator was so intoxicated that morning that he staggered as he walked, and did not know what he was about. With this testimony in the case, it was error to say to the jury that the evidence touching the testator's habits of intoxication had no bearing upon the question of his condition at the time the will was executed. In the case of a man who is shown to have taken one drink, and who has liquor at his command, an habitual lack of restraint in regard to it would increase the probability that he had taken more than could be directly proved, and so strengthen the probability that he was in the condition testified to by the contestant's witnesses.

As the objections taken to the evidence can be obviated by a change in the method of inquiry without detriment to the proponent's case, we do not deem it essential to consider them.

Judgment reversed and cause remanded.

STATE v. RUFUS YOUNG.

OCTOBER TERM, 1894.

Evidence. Charge of court.

1. The respondent was indicted for the larceny of a team at Sunderland. He testified upon the trial that he was not in that vicinity at the time of the larceny. *Held*, that a baggage-master upon the B. & R. railroad might testify that the night before the larceny a man rode in his car, and disappeared about the time the train passed Sunderland, and that two or three days afterwards he saw and spoke to the same man on the train, it appearing from other evidence that this man was the respondent.
2. It was no error for the court to say to the jury that certain facts developed by the testimony were "significant." As said, it did not amount to the expression of an opinion.

Indictment for larceny of two horses, two harnesses and a buggy wagon. Plea, not guilty. Trial by jury at the June term, 1894, Bennington county, TAFT, J., presiding. Verdict and judgment of guilty. The respondent excepts.

The testimony of the state tended to show that the respondent came over the Bennington & Rutland railway from the direction of Eagle Bridge on the evening of August 29, 1893, reaching the town and village of Sunderland at about seven o'clock in the evening; that about midnight he stole the team in question from the barn of a Mr. Hill, near the Sunderland railway station; that he took out the shafts which were on the buggy and put the pole in their place, harnessed the horses to the buggy, and then went back into the barn for the purpose of obtaining a pair of splices to attach to the

reins; that while he was in the barn he struck a box with his foot, thereby making a noise which alarmed the dog; that the barking of the dog aroused Mr. Hill, who came out of the house just as the respondent was about to drive away and grabbed the rear wheel of the buggy, but was unable to hold it; that the respondent drove the team for a considerable distance, and was captured by two men who had followed his tracks, while feeding the horses in the woods beside the road near Huntley hill.

The testimony of the state further tended to show that after his arrest the respondent detailed the manner in which the team had been taken, the pole put in the place of the shafts, the making of the noise, the consequent barking of the dog, and the coming out of Mr. Hill, together with a correct statement of the route which he had taken with the team.

Upon the trial the respondent testified that about two o'clock of the morning on which he was captured he left Chester, Vt., with a horse and buggy, intending to drive to the town of Peru on lawful business; that when he reached Huntley hill, where he was captured, he met a man by the name of Dantse with the team; that he had previously known Dantse, and that Dantse then informed him that he had been on the train, and there recognized a detective upon the night in question; that he thereupon jumped from the train and stole the team with an intention of driving it to Chester, Vt., and thereby making his escape; that the respondent gave Dantse some oats with which to feed his team, and advised him to leave the team beside the road where it would be seen and recovered, and proceed upon foot; that just at this juncture the officers who arrested him appeared, and that Dantse hid behind a tree and escaped detection, while he was taken away with the team. The respondent testified that he did not have more than from three to five minutes' conversation with Dantse.

The court, in its charge to the jury, remarked that the respondent must either have stolen the team himself or have obtained the particulars in reference to its larceny from Dantse, and it was somewhat significant that he should have learned so many things and given Dantse so much advice, in addition, in so short a time. To this observation of the court the respondent excepted.

The state introduced as a witness one Bixby, who testified that upon the evening before the larceny he was acting as baggagemaster upon the train on the Bennington & Rutland railroad, by which it was claimed that the respondent had come to Sunderland; that a man came into his car and asked him if the next station was Sunderland, to which the witness replied that it was Arlington, and that soon after the man disappeared; that two or three days afterwards he saw the same man on the train, and asked him if he was not the man who had come up in his car two or three nights before.

The testimony of the officer who arrested the respondent showed that the man to whom the witness spoke upon the last occasion was the respondent, who was then in charge of the officer, having been arrested, and being upon his way from Bennington to Rutland. The respondent excepted to the admission of Bixby's testimony.

J. K. Batchelder for the respondent.

Bixby could not identify the respondent as the man with whom he spoke upon the two occasions; hence his testimony was inadmissible; *Hammond v. Smith*, 17 Vt. 233; *McAlcer v. McMurry*, 58 Pa. St. 126; *Douglass v. Mitchell*, 35 Pa. St. 446; *United States v. Ross*, 92 U. S. 283; *Philadelphia City Pass. Co. v. Henice*, 98 Pa. St. 431; *People v. Hessing*, 28 Ill. 410; *Pennington v. Fell*, 11 Ark. 212.

F. C. Archibald, State's Attorney, for the state.

There was no error in the charge. *State v. O'Grady*, 65 Vt. 66.

TYLER, J. The testimony of the witness Bixby was, that on the evening of the alleged larceny a man rode with him in a baggage car; that at a certain point on the route the man asked him if the next station was not Sunderland; that he replied that it was Arlington, and that the man soon afterwards disappeared. This evidence only tended to show that the man was looking for the Sunderland station, near which the larceny was committed. It had no tendency to identify him as the thief.

Bixby further testified—and this was the subject of exception—that a few days later he saw the same person in a seat in front of him on a train going from Bennington to Rutland, and asked him if he did not come up with him “the other day”; and that the man replied in substance that if he did he behaved himself, and that he always intended to treat people well.

It is true that the whole testimony of Bixby, considered by itself, was immaterial, but the testimony of Yearly was that he was the officer who took the respondent in the train from Bennington to Rutland after the arrest; that the person with whom Bixby had the above conversation was the respondent, and that the conversation was had while he, Yearly, was sitting beside the respondent in the car on the route to Rutland. The testimony of Bixby, considered in connection with that of Yearly, tended to show that he saw the respondent on the night of the larceny near the place where it was committed. The evidence was not subject to the objection that it was a presumption based on another presumption; on the contrary, one witness testified to the *fact* of seeing a certain person on two occasions; the other witness testified that he saw the person on the second occasion, and identified him as the respondent.

There was no error in the remark of the court in the charge "that it was somewhat significant that the respondent could have learned so much and also advised Dantse what to do in so short a time." * * * The remark did not amount to the expression of an opinion, and the question whether the respondent learned the alleged facts from Dantse and advised him, or whether the respondent was there with the team was expressly submitted to the jury. *Pettingill v. Elkins*, 50 Vt. 431; *Rowell v. Fuller*, 59 Vt. 688.

Judgment that there was no error in the proceedings, and that the respondent takes nothing by his exceptions.

STATE v. ELIZABETH PLANT.

OCTOBER TERM, 1894.

House of ill fame. Keeping in two places. Reputation not evidence. Trial. Cross-examination.

1. There cannot be a conviction, upon a single count, of keeping a house of ill fame at two different places, for the keeping at each place is a distinct offence.
2. *State v. Nixon*, 18 Vt. 70, criticised.
3. In a prosecution for keeping a house of ill fame, evidence of the reputation of the house is irrelevant and inadmissible, for
 - (a) The words "ill fame" in the statute refer to the character of the place in fact and not to its repute, so that its reputation is not an element of the offence to be made out by the state; and

- (b) Reputation that the house is one of ill fame is not evidence tending to show that fact.
4. If a respondent may have been injured by the admission of irrelevant testimony, and it does not affirmatively appear that he was not, the judgment will be reversed.
 5. The extent of the cross-examination upon a given subject is largely in the discretion of the trial court. *Held*, no error to refuse to permit further cross-examination in this case.

Indictment for keeping a house of ill fame. Trial by jury at the June term, 1894, Caledonia county, TYLER, J., presiding. Verdict and judgment of guilty. The respondent excepts.

Dunnell & Nelson for the respondent.

The keeping of different houses at different places constituted different offences, and evidence thereof could not be given under one count. Bacon's Abridgment, G. p. 84; *Janson v. Stewart*, 1 T. R. 754.

Evidence of reputation was inadmissible. *State v. Boardman*, 64 Me. 523; 2 Bish., Crim. Proc., ss. 112, 116; *Torrey v. State*, 60 Ala. 97; *State v. Lyon*, 39 Iowa 379; *Commonwealth v. Stuart*, 1 S. & R. 341; *United States v. Jourdin*, 4 Cranch C. C. 338; *State v. Foley*, 45 N. H. 466.

Henry C. Bates, State's Attorney, for the state.

Evidence of reputation that the house was one of ill fame was not only competent, but necessary. *Caldwell v. State*, 17 Conn. 467; 1 Bish., Crim. Law, s. 1039; *State v. Hand*, 7 Iowa 411.

The respondent may be convicted of carrying on the business at different places continuously during the time alleged. *State v. Nixon*, 18 Vt. 70; *Com. v. Shea*, 150 Mass. 314.

ROWELL, J. The prisoner is informed against in one count for keeping a certain house of ill fame at St. Johnsbury on such a day and on divers other days and times between that day and the day of the filing of the information.

On trial the state first introduced evidence to prove the keeping of such a house in a certain building on a certain street in the village of St. Johnsbury, within the time alleged. It was then allowed to introduce evidence to prove the keeping by the prisoner of two other such houses on a certain other street in said village at different times before the time alleged, and the keeping of one of them again after the keeping of the one first mentioned, within the time alleged, and to use such evidence as further and substantive ground for conviction, on the theory that the crime is cumulative to an extent to warrant that.

Now the gist of this crime is the keeping of the house, and although the crime may have continuance by the repetition of the conduct that gives character to the house, yet that continuity may be broken so that separate and distinct offences will be committed; and it is thus broken when the business is given up at one place and resumed at another and a different place, for then the keeping of the former house is completed and ended, and as the keeping is the gist of the crime, the crime itself is equally completed and ended, and the resumption of the business at the other place is a separate and distinct keeping, and so a separate and distinct crime, and there are as many crimes as there are separate and distinct keepings of separate and distinct houses, and for the purposes of this case, we will say at separate and distinct, though successive, times. There is nothing in the nature of the offence opposed to this view, which is supported by *State v. Lee*, 80 Iowa 75; 20 Am. St. Rep. 401; which was an indictment in one count for keeping a house of ill fame. During the trial the prisoner asked that the state be compelled to elect whether it would proceed on the theory

that the house of ill fame was located in the first story of the building occupied by the prisoner or the second story; but it was held that all the rooms were properly treated as constituting but one building, and that therefore the court properly refused to compel the state to elect.

A house of ill fame is a nuisance at common law, for it holds out allurements to a miscellaneous and common bawdry, corrupting to the public morals; and nuisances, though successive and alike in kind are distinct in offence. A man erects a nuisance on a public street, and continues it there for a time. He commits an offence. He abates that nuisance, and straightway erects another like it on another street. He commits another offence.

But it is said that *State v. Nixon*, 18 Vt. 70, is opposed to the view we take. That was an indictment in one count for keeping a house of ill fame at Burlington on such a day and on divers other days and times between that day and the day of taking the inquisition. On motion in arrest it was objected that the indictment was insufficient, for that the local situation of the house was not stated nor even sufficiently alleged to be in any town or county. The court said that the offence is local, and must be described as committed in a particular town, and that the state is confined in its proof to that town, and cannot prove an offence anywhere in the county, and that a more particular description of the house was not required. This decided the point; but the court went on to say that a conviction on the indictment would be a bar to any other prosecution for keeping a similar house in the same town during the time alleged. No reason is given for this, but it seems to indicate that the court thought that the keeping of a similar house in the same town during the time alleged would be but part and parcel of the offence for which conviction was had. If this is what the court meant, we do not agree with it, for the reasons we have given.

As there was but one count in the information in the case at bar, there could be a conviction of only one offence; and as the state's testimony tended to show several offences, it should have been put to elect for which it would go, and it was error to allow it to go for all as one offence.

The statute makes penal the keeping of "a house of ill fame, resorted to for the purpose of prostitution or lewdness." In some of the states similar statutes are construed to require proof that the house had an ill fame in order to convict. That construction has prevailed to some extent in this state at *nisi prius*; but we regard it as illogical and unsound. It amounts to saying that however bad the house is in point of fact, it is no offence under the statute to keep it if it has not an ill fame. This is keeping clean the outside of the house, while the inside is full of prostitution and lewdness. Certain ancient sects did like things, and a woe was pronounced upon them for it by the highest authority. The words "ill fame" are used in the statute to give name and character to the house, and do not refer to its reputation. Both at common law and in common parlance the words "house of ill fame" mean, a house resorted to for the purpose of prostitution; and hence to say of one that he keeps a house of ill fame without more, is to charge the exact offence punished by the statute, and is actionable *per se*, and an inuendo that an accusation of the crime of keeping a house of ill fame was thereby meant is sufficient, without using the remaining words of the statute. *Posnett v. Marble*, 62 Vt. 481. The gist of the offence is the keeping of the house, irrespective of its fame. The statute aims at the fact, not the fame; at the substance, not the shadow.

It follows, therefore, ill fame of the house not being an element of the offence, that it was not only unnecessary to prove it, but that evidence of it was irrelevant to any issue involved, for all the cases hold that the character of the

house cannot be shown by proof of its reputation; for that purpose the testimony is mere hearsay.

It is unnecessary to refer at length to the authorities on this question. We think the weight of judicial opinion sustains the view we take. A pretty full discussion of the subject will be found in *Henson v. State*, 62 Md. 231, 50 Am. Rep. 204, and note; and in *State v. Lee*, 80 Iowa 75, 20 Am. St. Rep. 401.

But it is said that if it was not necessary to prove ill fame, and evidence of it was irrelevant, the prisoner was not harmed by it, for that its only effect was to impose an unnecessary burden on the state, which helped rather than harmed the prisoner. Although irrelevancy alone is not cause for reversal, but the testimony must have been such that it might prejudice the excepting party on an issue involved—*Boutelle v. Fire Ins. Co.* 51 Vt. 4—and although, presumably, the court tried to confine this testimony to the question of reputation—yet it is so often true that reputation is, to the common mind at least, indicative that the fact is as reputed to be, that we cannot say the prisoner was not harmed by the testimony. Indeed, we think it more likely that she was harmed than that she was not. It certainly is not clear that she was not, as it must be in order to make the error non-reversible.

A woman, called as a witness by the state, testified to having seen a man on the bed with the prisoner in her house. On cross-examination, after having testified to the condition of the bed and that they were on it and dressed, she was asked what they were doing, and replied, "Ask them." She was again asked, and replied, "I am not obliged to tell." She was again asked, whereupon the court said it saw no occasion for pressing inquiry further in that direction, and prohibited it. Although cross-examination is a right, yet the court may control the exercise of it to any extent that does not infringe the right itself. This

control is often exercised, and never more properly than in prohibiting details that may be offensive, when intimation and suggestion will convey the meaning of the witness just as well. Whether in this case the meaning of the witness had been sufficiently conveyed and her credibility sufficiently tested when the cross-examination was stopped, is difficult to tell. Some of us think they had not been, and that the right of cross-examination was infringed; while others think we cannot say that, because the trial court saw the witness and noted the attendant circumstances, and so could judge better than we can when the examination had gone far enough to accomplish its legitimate ends.

There is no need of considering the other points of exception, as the questions raised are largely eliminated by the holding on the second point considered, and the remainder do not inhere in the case at all, and can scarcely again arise.

Exceptions sustained, judgment reversed, verdict set aside, and cause remanded for a new trial.

JOSEPH H. WARD AND OTHERS

v.

H. O. CAMP.

MAY TERM, 1893, WASHINGTON COUNTY.

*Change of possession in sale of personal property. When
vendor's lien may supply the want of.*

If the owner of personal property sells and subsequently repurchases it, a vendor's lien reserved upon such re-sale will be valid, although as against creditors there has been no sufficient change of possession, for the reserving and recording of the lien takes the place of possession.

Action on the case for false representations in the sale of a horse. Plea, the general issue, with notice that the defendant sold the horse as deputy sheriff upon execution. Trial by jury at the September term, 1892, Washington County, Ross, C. J., presiding. Verdict and judgment for the plaintiffs. The defendant excepts.

The testimony of the plaintiffs tended to show that they were present where the defendant was selling the horse in question at auction; that while the sale was in progress one Boyce and the constable of the town of Barre appeared and notified the defendant that they held a lien note upon the horse in favor of Geo. W. and Abraham Mann, which lien note they then had and upon which they demanded payment or the possession of the property; that thereupon the defendant assured the plaintiffs that this was not true; that the

title to the horse was perfect and that he would guarantee the same, and that they thereupon bid off the horse upon the strength of these representations, and subsequently took it and paid for it upon the repetition of these same representations by the defendant; that soon after the sale the horse was taken from their possession by the constable upon the lien note of the Manns.

The question litigated upon the trial was, as to the validity of the title of the Manns under their lien note, and the facts bearing upon that question are fully stated in the opinion.

Martin & Slack for the defendant.

There is no sufficient change of possession to protect the title of the Manns to the horse, and the court should have directed a verdict for that reason. *Farnsworth v. Shepard*, 6 Vt. 521; *Weeks v. Prescott*, 53 Vt. 71; *Mott v. McNeil*, 1 Aik. 163; *Weeks v. Weed*, 2 Aik. 67; *Gates v. Gaines*, 10 Vt. 351; *Houston v. Howard*, 39 Vt. 55; *Flanagan v. Wood*, 33 Vt. 332; *Mills v. Warner*, 19 Vt. 609.

E. W. Bisbee for the plaintiffs.

If the sale to the Manns and the subsequent re-sale to McKane were honest and *bona fide* transactions, their title under the lien note is a valid one. R. L., s. 1992; *McPhail v. Gerry*, 55 Vt. 174.

MUNSON, J. The plaintiffs' evidence tended to show the following facts: John McKane, as agent for his wife, Hannah McKane, bought the horse in question of Charles Martin, paying a part of the purchase price out of money furnished by his wife for that purpose, and giving a mortgage on it in his own name to secure the payment of the balance, which mortgage Hannah McKane afterwards caused to

be paid. John McKane kept and used the horse for a year or more, after which Hannah McKane sold it to the Manns, who kept it for a part of a day, and then let John McKane take it to go home with, after which it remained in John McKane's possession. About four months after the horse was thus taken by John McKane the Manns sold it to him, reserving a lien to secure the payment of the price, and placing their lien upon record. Soon after this the horse was attached by the defendant upon a writ against John McKane, and in due course was sold at sheriff's sale to the plaintiffs, from whom it was afterwards taken upon the lien held by the Manns.

The defendant moved for the direction of a verdict in his favor on several grounds, of which the one now insisted upon is that there was no sufficient change of possession in the sale to the Manns. The court denied this motion, and charged the jury that whether the horse was owned by John McKane or Hannah McKane, if the sale of it to the Manns was a *bona fide* transaction, and if the sale of it by them to John McKane was also a *bona fide* transaction, and if the lien note was duly recorded, the note would be valid against the defendant's sale.

The defendant argues that there was error in assuming that it made no difference whether the horse was owned by John McKane or his wife, for the reason that if it was owned by John McKane there was no change of possession in connection with the sale to the Manns, and that consequently the Manns acquired no title as against McKane's creditors, and could not obtain a claim valid against his creditors by redeeming to him with the reservation of a lien.

It is clear that if John McKane was the owner of the horse, so that the sale was from him to the Manns, the sale was void as to McKane's creditors for the want of a sufficient change of possession; and if it had been attached as McKane's property at any time after it went back into his possession, and

before it was resold to him with the reservation of a lien, the attachment would have been good. *Morris v. Hyde*, 8 Vt. 352; *Rogers v. Vail*, 16 Vt. 327; *Mills v. Warner*, 19 Vt. 609. But the title would have passed as between the parties, and the Manns could have protected themselves by taking the property into their possession at any time before an attachment was made. *Fletcher v. Howard*, 2 Aik. 115; *Kendall v. Samson*, 12 Vt. 515. The question is whether the taking and recording of this lien upon a resale of the property afford the Manns the same protection that they would have secured by taking the horse into their possession.

At the time of the conditional sale the Manns had a title which was good as against McKane, and which could have been made good as against his creditors by taking possession of the property. We do not consider that it was necessary to the creation of a valid lien upon a resale of the property that this title should first be perfected as against creditors by taking possession. The resale to McKane with the reservation and recording of a lien served the same purpose as regards creditors that the law seeks to accomplish by requiring a change of possession. The property no longer remained in McKane's possession under circumstances which justified others in believing it to be his. It had been made the subject of a further transfer, under which the right of the original vendees was a matter of record and not dependent upon possession. We see no reason why this should not be held to protect them as effectually as would a change in the possession of the property. We think the attachment of this horse, after the reservation and recording of the lien, gave the creditor no more right as against the Manns than is acquired by one who attaches property sold without present delivery, after it has been taken possession of by the vendee.

Judgment affirmed.

STATE v. JERRY BRADLEY.

OCTOBER TERM, 1894.

Expert testimony. Evidence. Practice. Verdict of guilty of murder in the second degree no bar to subsequent conviction for murder in first degree.

Charge of Court. Refusal of assistant judge to sit no error.

1. A physician of fourteen years' practice may give an opinion, as an expert, that a stain upon the knife, with which it was claimed that the homicide was committed, and which he examined soon after the homicide, was a blood stain.
2. The fact that the witness, in answer to a question calling for his opinion, replied, "we thought," does not render the testimony inadmissible, it not appearing that any other person examined the knife with him.
3. An altercation between the deceased and respondent, two days before the killing, accompanied by personal violence, was held admissible under the circumstances of this case.
4. Where testimony is stricken out, at the respondent's request, and no exception is taken upon the trial concerning it, no question is presented to the supreme court.
5. The remoteness of time at which the respondent threatened to kill the deceased goes to the weight and not to the competency of the testimony.
6. Inculpatory conversations between the prisoner and another are admissible, although both are at the time under arrest for the commission of the crime.
7. If a respondent, upon an indictment for murder in the first degree, is convicted of murder in the second degree, and thereupon alleges exceptions, which are sustained, he may be again tried for murder in the first degree.

8. Where the whole charge is referred to in the bill of exceptions, the court will look into those parts not set forth in words in the exceptions for the purpose of ascertaining whether those so set forth are elsewhere qualified or explained.
9. Where the prisoner and deceased were alone together in a room at the time of the homicide, the jury were properly told that, in determining the degree of murder, they should consider what happened in the room when the deceased was killed, as far as that could be fairly inferred from the sounds and conversation testified to, if they believed that testimony to be true.
10. It is not error if one of the assistant judges refuses to sit during a trial, although he is not disqualified or incapacitated from so doing.

Indictment for murder in the first degree. Plea, not guilty. Trial by jury at the June term, 1892, Bennington County, MUNSON, J., presiding. Verdict of murder in the second degree. The respondent excepts.

The respondent was indicted for the murder of one Maggie Shea. It appeared that the deceased, a married woman, living separate from her husband, had kept house for the respondent, a married man, not living with his wife, for some years before her death.

The homicide occurred on the afternoon of Tuesday, at the house of one Dillworth, where the deceased had gone the evening of the Sunday previous. The evidence tended to show that at the time of the homicide there were present in the house, Thomas White, Joseph Lyons, John Bolger, and the respondent; that the other three had been there most of the time since Sunday night; that on Monday afternoon, White had gone to the house of the respondent and persuaded him to come to the Dillworth house for the purpose of settling up his differences with the Shea woman, and taking her home; that the respondent had gone to the Dillworth house at that time, and that they had all remained there from then on, drinking heavily; that at the time of the homicide the de-

ceased was lying upon the bed in a bed-room opening out of the room in which were Bolger and the respondent, and that the respondent got up and went into the bedroom where she was. Bolger testified that he heard the respondent talking with her at that time; heard him ask her whether she was going back to live with him; heard her refuse to do so; heard her call him names; heard him accuse her of sexual intimacy with Dillworth and White, and threaten to murder her, then heard a rustling noise, heard her tell him to get off from her, heard a shriek, followed by a moan and a gasp, after which the respondent called to him that Mag. was dead, and asked him to come in; that the respondent said soon after coming out from the room, that she died of heart disease, which statement he repeated to several persons at different times after her death, claiming that she had long been troubled with that difficulty.

An autopsy showed that the deceased had apparently met her death from a stab in the left breast which was about one-half inch wide and two inches and a half deep, and which the testimony tended to show might have been inflicted by the knife which was found upon the person of the respondent upon the day of the homicide, after his arrest.

Upon the trial the respondent took the following exceptions to the admission of evidence:

Dr. Nichols testified that he arrived at the Dillworth house some four hours after the death, and made an examination of the deceased. He produced a knife which the testimony tended to show was taken from the respondent that day, after the homicide. There appeared to be upon the blade of the knife a slight discoloration. Upon this subject the following testimony was admitted, subject to the exception of the respondent:

“Q. Did you make such an examination of that knife at that time as to be able to form any opinion as to how that discoloration was caused?

"A. We did.

"Q. Doctor; you can state what your opinion is as to the cause of that discoloration.

"A. We thought it was stained with blood, and I preserved the knife and kept it from being handled so if the question came up later, and it was necessary to make a more thorough examination, we could do it. It was not called for and consequently we didn't do it. I didn't allow the knife to be handled and kept it under lock and key; that is the facts of the case.

"Q. Did you think it was stained with blood?

"A. Yes, sir."

Respondent especially excepted to the form of the answer in stating, "we thought," in the former answer, whereupon the witness said, "I thought it was."

The witness testified that he had been a practicing physician for fourteen years.

The state was allowed to show, subject to the exception of the respondent, that on the Sunday night before the murder the respondent met the deceased and another woman at some distance from the Dillworth house, driving his team; that thereupon the respondent told the other woman to get out of the wagon, got in himself and endeavored to persuade the deceased to return home with him, whereupon the deceased sprang out of the wagon and started towards Dillworth's; that the respondent shortly afterwards followed her, presently came up with her, used threatening and insulting language to her, knocked her down, took her by the hair of the head and swung her around, and assaulted her companion.

The state was also permitted to show, subject to the exception of the respondent, that some three years before the homicide the witness had heard the respondent threaten to kill the deceased if she left him and went away with any one else.

Soon after the homicide, the respondent and Bolger were both arrested upon the charge of having been implicated in it. While under arrest at the Dillworth house, and imme-

diately following, certain conversations took place between them in reference to the affair which tended to inculcate the respondent, and these conversations the state was allowed to show under the exception of the respondent.

The respondent was first tried at the June term of Bennington County Court, 1890, and found guilty of murder in the second degree. Thereupon he alleged exceptions to the supreme court, which were sustained, and the case remanded for a new trial. The plaintiff insisted that upon the present trial he could only be convicted of murder in the second degree, and requested the court to so instruct the jury. This the court declined to do, and instructed the jury that they might find the respondent guilty of murder in the first degree, to which the respondent excepted.

One of the assistant judges had participated as a juror in the previous trial, and for this reason declined to sit upon this trial, to which the respondent excepted.

The exceptions taken by the respondent to the charge of the court appear in the opinion.

W. B. Sheldon for the respondent.

The statements of Bolger, in the presence of Bradley, and his replies thereto, were improperly admitted, since both were under arrest for this crime, and there was a strong temptation for each to incriminate the other. *People v. M. Quade*, 18 N. E. (N. Y.) 166; *State v. Thibau*, 30 Vt. 105; 1 Greenl. Ev., s. 111; *Bradshaw v. Com.*, 10 Bush 576; *State v. Oliver*, (La.) 2 So. Rep. 194; *State v. Sneed*, 88 Mo. 138; *Greenfield v. People*, 85 N. Y. 75; *State v. Shuford*, 69 N. C., 486; *Grigby v. State*, 23 Tex. App. 477; *Hoyt v. State*, 9 Texas App. 571; *Sharp v. People*, 107 N. Y. 464.

The former verdict of murder in the second degree was a bar to a conviction in this trial for murder in the first degree,

and the jury should have been so instructed. 3 Greenl. Ev., s. 35; Whar. Crim. Law, s. 573 (a); 1 Bish., Crim. Law, s. 1004 (7th Ed.); *State v. Belden*, 33 Wis. 120; s. c., Am. Rep. 748; *State v. Martin*, 30 Wis. 216; s. c., 11 Am. Rep. 567; *State v. Smith*, 53 Mo. 139; *State v. Ross*, 29 Mo. 32; 1 Bish. Crim. Law, (4th Ed.) s. 849; Cooley's Con. Lim. 328; *State v. Kittle*, 2 Tyler, 471; *Campbell v. State*, 9 Yerg. 334; *Esmond v. State*, 1 Swan. 14; *Jordan v. State*, 22 Ga. 546, 557; *State v. Tweedy*, 11 Iowa 352; *Morris v. State*, 8 S. & M. 762; *Hurt v. State*, 25 Miss. 378; *Brenon v. The People*, 15 Ill. 511; *People v. Gilmore*, 4 Cal. 376; *Jones v. State*, 13 Texas 1; *State v. Kattlemann*, 35 Mo. 105; *State v. Hill*, 30 Wis. 416, 422; *Cheek v. State*, 4 Tex. App. 444; *Johnson v. State*, 29 Ark. 31; *Sylvester v. State*, 72 Ala. 201; *Smith v. State*, 68 Ala. 424; *State v. Joseph*, (La.) 3 So. Rep. 405; *Golding v. State*, (Fla.) 12 So. Rep. 525; *Jordan v. State*, 81 Ala. 20; *Smith v. State*, 22 Texas App. 316; *Johnson v. State*, (Fla.) 9 So. Rep. 208; *Jones v. State*, 13 Texas 168; *People v. Apgar*, 35 Cal. 389; *People v. Gilmore*, 4 Cal. 376; *State v. McNaught*, 36 Kan. 624; *State v. Payson*, 37 Me. 361; *Com. v. Herty*, 109 Mass. 348; *State v. Brennon*, 55 Mo. 63; *People v. Cignarale*, 110 N. J. 23; *Guenther v. People*, 24 N. Y. 100; *People v. Dowling*, 84 N. Y. 478; *Parker v. State*, 22 Tex. App. 105; *State v. Moon*, 41 Wis. 684; *Robinson v. State*, 21 Texas 160; *Bell v. State*, 48 Ala. 684, S. C. 17 Am. Rep. 40; *Sipple v. People*, 110 Ill. 144; *Logg v. People*, 8 Ill. 99; *State v. Malling*, 11 Iowa 239; *State v. Bruffee*, 75 Mo. App. 389; *Slaughter v. State*, 6 Hump. 410.

F. C. Archibald, State's Attorney, and *J. K. Batchelder* for the state.

The time within which a threat has been made bears upon

the weight and not the admissibility of the testimony. *State v. Bradley*, 64 Vt. 466; 3 Greenl. Ev., s. 15.

The court correctly instructed the jury that they might find the respondent guilty of murder in the first degree, notwithstanding the former verdict. *Com. v. Dismarteau*, 16 Gray 1; *Com. v. Gardner*, 11 Gray 438; *Bradley v. State*, 26 Ga. 579; *People v. Keefer*, 65 Cal. 232; *Morris v. State*, 1 Blackf. 37; *Veatch v. State*, 60 Ind. 291; *State v. McCord*, 8 Kan. 232; *Bohanan v. People*, 17 Neb. 57; 53 Am. Rep. 791; *State v. Stanton*, 1 Ired. 424; *Leslie v. State*, 18 Ohio St. 390; *Farvis v. State*, 19 Ohio St. 585; *State v. Behimer*, 20 Ohio St. 572; *State v. Commissioners*, 3 Hill S. C. 239; *United States v. Harding*, 1 Wall. 127; *Com. v. Arnold*, 83 Ky. 1; *People v. Palmer*, 109 N. Y. 413; *King v. Missouri*, 10 U. S. 221.

ROWELL, J. The deceased was killed by a stab in the breast. The testimony tended to show that it might have been made with a knife taken from the prisoner after his arrest on the day of the homicide. The state called a physician of fourteen years' practice, who produced said knife, and testified that when it came into his possession he examined it with a glass and that there seemed to be a stain of a reddish color on the blade. He was then asked, subject to exception, to give his opinion as to the cause of the stain. He answered, "We thought it was stained with blood." The prisoner's counsel especially excepted to the answer because the witness said, "We thought," whereupon the witness said, "I thought it was." Here was no error. In the first place, the witness was not giving his opinion as an expert, but his opinion based upon what he had observed and testified to, which was proper. Besides, he was an expert, as he was a physician of experience, and could testify as such, the matter to which he was testifying coming within the scope of his profession and experience. Nor did the

use of the plural instead of the singular pronoun vitiate. The question called for the opinion of the witness only, and because he happened to use language indicating, what does not appear, that another examined the knife with him, affords no ground for reversal.

The testimony as to what took place between the prisoner and the deceased in the road on Sunday, two days before the homicide, was not irrelevant nor too remote, as claimed. It bore directly on the question of malice and motive, as it tended to show that a crisis had been reached in their affairs, and that the prisoner was very angry at the deceased, as he then subjected her to much abuse and great personal violence because she refused to go home with him and to live with him again, but insisted upon returning to Dilworth's, whence she had just come.

What Lyons testified about hearing the deceased say that the prisoner had hit her with two links of a chain was stricken out at the prisoner's request, on its appearing that the prisoner was not present when it was said, and no exception was taken concerning it, so there is no ground for the argument addressed to us on that point.

The admissibility of the prisoner's threats to kill the deceased if she left him and went with another, the testimony tending to show that that event had happened, or that the prisoner thought it had, was settled when the case was here before—64 Vt. 466. The fact that the testimony now places the making of the threats a few months earlier than it did before does not go to its competency, but only to its weight.

What Bolger said about the prisoner being the one who killed the woman and the prisoner's replies thereto, as they were more or less inculpatory of him, were admissible on general principles. The fact that both were under arrest at the time does not affect the question of admissibility.

The prisoner was properly put on trial again for murder in the first degree, notwithstanding he had before been con-

victed of murder in the second degree and a new trial granted on exceptions. The authorities differ on this question. In many of the states, and probably in a majority of them, it is held that when, on an indictment for murder, the accused is found guilty of murder in the second degree it is virtually an acquittal of murder in the first degree, and that, if the verdict is set aside and a new trial granted at the instance of the accused, he cannot, on such trial, be convicted of murder in the first degree; that the only effect of setting aside the verdict for the lesser crime is, to leave that issue open for another trial and also to leave undetermined the further question of whether the accused had committed any criminal homicide of a grade less than murder in the second degree. The case of *State v. Belden*, 33 Wis. 121, 14 Am. Rep. 748, is a leading case of this kind.

But in other states the contrary is held. They say that the necessary result of reversing the judgment and granting a new trial is, to set aside the whole verdict, and that having been done at the instance of the accused, it can neither operate as an acquittal nor a bar to the further prosecution of any part of the crime charged; that the verdict being set aside, it leaves at issue and undetermined the question of the homicide and also the question of whether the accused committed it if one was committed; that on the retrial on a plea of not guilty, the legal presumption of innocence prevails, and that the state is bound to prove every essential fact; that the only effect, therefore, that can be given to the part of the verdict that acquitted the accused of murder in the first degree after the rest of it has been set aside is, to regard it as finding the quality of an act, the existence of which is undetermined, which would be a verdict to the effect that if the accused committed the homicide it was not such a killing as made it murder in the first degree, which would be untenable, as there can be no legal determination of the character of the malice of the accused in re-

spect to a homicide that he is not found to have committed, or rather, of which, under his plea, he is presumed to be innocent. A verdict of murder in the second degree is only an implied acquittal of murder in the first degree; and if the verdict from which the inference is drawn is set aside, nothing remains to sustain the inference, and the verdict and its incidents fall together, and the indictment is left to stand as to the crime of which the accused was convicted as though there had been no trial. This view is sustained by *Bailey v. State*, 26 Ga. 579; *State v. Behimer*, 20 Ohio St. 572; *United States v. Harding*, 1 Wall. Jr. 147, and other cases. We understand this to be the view that has obtained and been practiced upon in this state, certainly when the result of the former trial was not, in effect, as it was not here, an acquittal of another crime charged, but only a failure to find the requisites to aggravate the crime found to a higher grade. *State v. Kittle*, 2 Tyler, 471, is not to the contrary.

Nor does this view contravene the principle that one cannot be twice put in jeopardy for the same offence, for that means, without his consent, and the matter of taking exceptions is a privilege accorded to the accused but not to the state, and he can avail himself of it or not as he pleases. If he does avail himself of it, he thereby asks for a new trial or a discharge altogether, as the case may be, and in asking for a new trial, he is deemed to waive his right to immunity from further jeopardy in case a new trial is granted. *People v. Palmer*, 109 N. Y. 413, 420. The authorities on both sides of this question are referred to in a note to *Commonwealth v. Arnold*, (Ky.) 4 Am. St. Rep. 117.

There are one or two other exceptions to the admission of evidence, but they are of minor importance and not sustained.

The prisoner excepted to the charge as to what would not be sufficient to reduce the crime from murder to man-

slaughter. It is claimed that the charge on this point is essentially wanting in completeness of statement of what the distinction is between murder and manslaughter; that is, of what will reduce the crime of murder in the second degree to manslaughter. The whole charge is made a part of the exceptions, and on looking into that, we find that in parts of it not set out in the exceptions the court fully and accurately stated that distinction and what would reduce the crime of murder in the second degree to manslaughter. It is further claimed that the court did not state, even in the abstract, that if the jury failed to find beyond a reasonable doubt that the fatal blow was struck with malice aforethought it would reduce the crime to manslaughter. But in another part of the charge the court told the jury in so many words that there could be no conviction of murder unless the existence of malice was established beyond a reasonable doubt.

The court charged that if the jury found that the prisoner struck the fatal blow, they would consider, among other things, what happened between them in the room when she was killed, as far as they thought it fairly inferable from the sounds and conversation that were testified to, if they believed that testimony to be true, and from it all determine what took place between the parties before the fatal blow was struck, and then, by an application of the principles before explained to them, determine the degree of criminality that attached to the prisoner's act. The respondent excepted to the clause relating to things fairly inferable from the sounds and conversation testified to. The jury had before been fully instructed as to the measure of proof, and told that the state must establish beyond a reasonable doubt every fact necessary to make out guilt. The prisoner's counsel suggests nothing on the point of this exception that shows error.

The assistant judge who did not sit in this trial because he was a juror on the former trial was not, probably, disquali-

fied for that reason ; but whether he was or was not, it is not a ground of exception that he did not sit. The statute makes two judges a quorum, therefore two constitute a legal court, and it is not the legal right of a party that all shall sit if not disqualified. It has always been the practice, as far as we know, for one or the other of the assistants to be absent occasionally though not disqualified, and it never has been thought to lie with a party to object. It is analogous to the case of a grand jury, where eighteen are called but twelve can find a bill. It is not necessary to the validity of an indictment that all should participate. If twelve participate it is enough, though the others are not disqualified. *State v. Brainerd*, 56 Vt. 532. *State v. Blair*, 53 Vt. 24, is not opposed to this view.

Judgment that there is no error in the proceedings of the county court, and that the respondent take nothing by his exceptions.

STATE v. ARTHUR CARROLL.

JANUARY TERM, 1895.

Rape. Complaint of prosecutrix.

In a prosecution for rape, or an attempt to commit rape, the state may show that the prosecutrix made complaint, and the name of the person whom she charged as her assailant, but not the details of her statement.

Indictment for an assault with intent to commit rape. Plea, not guilty. Trial by jury at the December term, 1894, Lamoille county, START, J., presiding. Verdict, guilty. The respondent excepts.

The indictment was for a criminal assault upon a female child four and one-half years old. She was not permitted to testify, for the reason that she did not understand the nature of an oath. The testimony of the prosecution tended to show that the assault was committed in a barn. The mother of the child was allowed to testify that her daughter made complaint to her at the time, and, under exception, to state where she said the respondent first touched her outside the barn, and where he made the attempt inside the barn.

B. A. Hunt for the respondent.

The details of the complaint of the prosecutrix cannot be shown. *State v. Niles*, 47 Vt. 82; *State v. Bedard*, 65 Vt. 278; *State v. Mitchell*, 68 Iowa 116; *State v. Clark*, 69 Iowa 294; *McGee v. State*, 21 Texas App. 670;

Churchill v. Smith, 16 Vt. 560; *Law v. Fairfield*, 46 Vt. 425.

R. W. Hurlburt, State's Attorney, for the state.

Evidence of the complaint was admissible. 1 Rosc. Crim. Ev., 8th Am. Ed., 41; *Lambert v. People*, 29 Mich. 71; *People v. Gage*, 28 N. W. Rep. 835; *McMurrin v. Regby*, 45 N. W. Rep. 877; *State v. Byrne*, 47 Conn. 465; *State v. Jones*, 64 Iowa 353.

TAFT, J. I. It was held in *State v. Niles*, 47 Vt. 82, that it is competent to prove that the person upon whom a rape is alleged to have been committed made a complaint, and that an individual, the complainant naming him, was charged by her with its commission. The rule is the same in a prosecution for an attempt. In some jurisdictions the details of the complaint may be given, but in this state the prosecution has never been permitted to go further than to prove that the person complained that an assault had been made, and that a certain person made it. We are not inclined to extend the rule. It was a departure from it, and therefore error, when the witness was allowed to state any of the details of the complaint, such as the exact location of the alleged assault, that it was committed upon a pile of corn stalks, and in a certain corner of the barn.

II. As we are not fully agreed upon the question raised by the exception to the charge, and as the same question will not necessarily arise upon another trial, we do not consider it.

The first exception is sustained. Judgment reversed, verdict set aside, and cause remanded for a new trial.

VILLAGE OF MONTPELIER

v.

DAYTON P. CLARKE ET AL.

JANUARY TERM, 1895.

Suit on tax collector's bond. Grand list. Uncollected taxes. Application of payments.

1. The charter of the village of Montpelier provided that the bailiffs might at any time before the voting of a tax make a grand list upon the basis that the town grand list comprised within the limits of the village should constitute such grand list, and that the bailiffs should deduct therefrom the real estate lying without the limits of the village, and further that the bailiffs should make out and deliver to the collector a rate bill for the collection of any tax duly voted. The bailiffs assessed the tax in question upon property and persons within the limits of the village upon the basis of the town grand list, and delivered the rate bill to the defendant as collector, who receipted for and proceeded under the same. *Held*, that in a suit upon the collector's bond for not collecting and paying over the tax, the objection that no separate grand list for the village was prepared before the voting of the tax could not be urged.
2. In a suit against a collector for not paying over taxes actually collected, it is no defence that the grand list was invalid.
3. A tax collector and his sureties are liable in an action upon his bond, conditioned for the faithful performance of his duties, for uncollected taxes, unless some valid excuse is shown for their non-collection.

4. In a suit upon a tax collector's bond for not collecting and paying over the taxes for a particular year, it is not a defence that he did pay over the money collected on that bill to apply on previous bills, and therefore no error to reject evidence of that fact.

Debt on bond. Heard on the report of a referee at the September term, 1894, Washington county, MUNSON, J., presiding. Judgment for the plaintiff. The defendant excepts. The opinion states the facts.

Dillingham, Huse & Howland for the defendants.

John H. Senter and *George W. Wing* for the plaintiff.

The invalidity of the grand list cannot be urged as to taxes actually collected. *Butler v. Jarvis*, 22 N. E. (N. Y.) 561; *Lynn et al. v. Mayor of Cumberland*, 26 Atl. (Md.) 1001; *Tunbridge v. Smith*, 48 Vt. 653; *State v. Henry*, 57 Miss. 886; *Brunswick v. Snow*, 73 Me. 179; *Boothbay v. Giles*, 68 Me. 162; Cool., Tax., 498-500 and cases cited; *Desty*, Taxation, 1030, 1031.

The grand list was valid. The provision as to its being made up before the voting of the tax is merely directory. *French v. Edwards*, 13 Wall. 506-511; *Perry and Hale Counties v. Railroad*, 65 Ala. 398; Cool., Tax., 212 *et seq*; *Canal Co. v. Rockingham*, 37 Vt. 626; *Willard v. Pike*, 59 Vt. 211; *Torry v. Millbury*, 21 Pick. 64.

TYLER, J. The action is debt on a bond signed by defendant Clarke as collector of taxes of the village of Montpelier as principal, and by the other defendants as sureties.

The charter of the village, No. 89, Laws of 1855, provides:

"Section 10. The bailiffs are empowered to make a grand list for said village at any time previous to voting a tax, on the following basis: The town grand list of Montpelier, comprised within the limits of said village, shall constitute

such grand list, and the bailiffs shall deduct therefrom all real estate lying and being without the limits of said village, and said list when completed shall be final and conclusive."

"Section 1. * * The village of Montpelier * * may at any annual or special meeting called for that purpose as herein provided, lay a tax on the polls of the inhabitants of said village and ratable estate within the same, whether of residents or non-residents, for any of the purposes herein mentioned; and the bailiffs shall make out a rate bill accordingly, and deliver the same to the collector, who shall have the same power to collect such tax as the collector of town taxes." * * *

"Section 7. It shall be the duty of the said bailiffs to make out and deliver to the collector an assessment or rate bill of all taxes which shall be laid by said corporation." * * *

The referee finds that defendant Clarke was elected constable and collector of the village at the annual meeting held December 3, 1888; that he duly qualified and entered upon the duties of the office; that bailiffs were elected pursuant to the charter, and that a tax of fifty cents on the dollar of the grand list of the taxpayers was voted to be paid into the treasury on or before February 1, 1889.

It is also found:

"That in pursuance of said vote the bailiffs made out a rate bill for said tax upon the grand list of the village, as ascertained and determined by taking the town grand list, which included that of the village, and deducting therefrom the real and personal estate and polls known by them to be outside the village limits, and assessing the tax upon the list remaining after such exclusion, but no separate and distinct document in grand list form was made up by the bailiffs as a specific village grand list."

The collector took the tax bill, gave a receipt for it to the bailiffs, and entered upon the duty of collecting the taxes, and paying them over to the treasurer.

1. The defendants claim that the grand list was not made by the bailiffs in compliance with the charter. It is not urged that the manner of obtaining it was unlawful, but that

it should have been ascertained and made the basis of taxation before the tax was voted.

It is true that when the tax was voted the grand list of the village had not been separated from that of the town, but as each taxpayer in the village must have had a grand list, it may be presumed that the tax was voted with reference to the respective lists of the taxpayers. If the list of the village had been separated from that of the town before the tax was voted, each individual tax would have been the same as it was in fact made by the bailiffs. So the irregularity, if there was one, did not affect the correctness of the assessment.

It is found that the treasurer kept an account with the collector, charging him with the amount of the tax bill and crediting him with the payments thereon; that Clarke had been collector during several previous years, from time to time made collections on the arrearages for those years and paid the same to the treasurer, and that the collections, in every instance, as they were received by the treasurer, were credited by him to the collector upon such tax bills as the latter directed. The amount of the tax bill in question was fifteen thousand seven hundred thirty-two dollars and eighty-eight cents; the amount paid and credited was thirteen thousand eight hundred sixty-six dollars and fifty-one cents; abatements, two hundred ninety-six dollars and ninety cents, which left a balance due from Clarke of one thousand five hundred sixty-nine dollars and forty-seven cents. This sum was inclusive of the two per cent fees allowed the collector for the collection of thirteen thousand eight hundred sixty-six dollars and fifty-one cents, being two hundred seventy-seven dollars and thirty-three cents, and four hundred twenty-seven dollars and nineteen cents uncollected taxes. No evidence was offered before the referee to show that the uncollected taxes should be abated.

Neither upon reason nor authority can the defendants

avail themselves of the invalidity of a grand list as an excuse for the collector's not paying over the money actually received by him. Any such irregularity or defect would be considered as waived by the taxpayers, and the money received from them by the collector would be held by him for the village. A failure to pay over the money collected constituted a breach of the condition of the bond. Desty on Taxation, 1073; *Boothby v. Giles*, 68 Me. 160; *Brunswick v. Snow*, 73 Me. 179; *Ford v. Clough*, 8 Greenl. 234; s. c. 23 Am. Dec. 513; *Sandwich v. Fish*, 2 Gray 298; *Tunbridge v. Smith*, 48 Vt. 648.

2. The real question is, whether the defendants are liable for the four hundred twenty-seven dollars and nineteen cents uncollected taxes. In the case last cited the court said:

"By receiving the rate bills and warrants the collector impliedly agreed to collect and pay over the taxes according to the directions accompanying each rate bill and warrant. There is always attached to this agreement of the collector an * * * implied condition that he will do so provided the tax is legal and collectable."

Desty on Taxation, 1034, says:

"On the delivery of the assessment book to the collector, *prima facie* he becomes chargeable with the tax assessed to each taxpayer, and when the time for collecting has expired he must be deemed to have collected it, unless he discharges himself by showing that, in the mode prescribed, he has obtained credit for it as an error of assessment, or because of the taxpayer. * * * A tax collector is *prima facie* liable for the whole amount of the assessment roll, and the burden of proof is upon him to show discharge, payment," etc.

It has been held in Louisiana that:

"The process of computing debits and credits on a tax collector's account is very simple. He is charged with the sum total of the rolls and of the licenses, and it is for him to offset these by legal vouchers for legal payments, and by a delinquent list in due form. The tax collector is presumed

to have collected all that is on his roll and his number of licenses, and if he does not settle by a given day he is a defaulter *ipso facto*. Everything is presumed against him. He is *prima facie* liable for the whole amount of the assessment roll, and the *onus* of proof is upon him to show discharge, payment, etc." *State v. Powell*, 8 Am. St. Rep. 522 and cases cited.

The conditions of the bond are not recited in the report, but may be assumed to have been in accordance with R. L., s. 2782, "for the faithful performance" of duties. The referee does not find, nor was it claimed in defence, that the four hundred twenty-seven dollars was uncollectible, or should have been abated. Upon the report the collector was guilty of a breach of the condition of the bond, for which he and his sureties are liable.

3. *Lyndon v. Miller*, 36 Vt. 329, and *Carpenter et al. v. Corinth*, 62 Vt. 111, are full authorities for holding that the payment by the collector of taxes of the year 1888 upon tax bills of former years would have constituted no defence to this suit if that fact had been established; therefore, there was no error in excluding the evidence.

Judgment affirmed.

GEORGE B. DAVIS, ADMR.,

v.

MARY FLINT'S ESTATE.

OCTOBER TERM, 1894.

Claim against deceased as executrix. Cannot be presented to commissioners.

A claim against a deceased person as executrix cannot be presented to commissioners upon her estate, but must be determined upon the settlement of her account as such executrix in the probate court.

Appeal from an order of the probate court for the district of Caledonia accepting the report of commissioners upon the estate of Mary Flint, by which the claim of the plaintiff was disallowed. Trial by court at the June term, 1894, Caledonia county, TYLER, J., presiding. Judgment for the plaintiff. The defendant excepts.

M. Montgomery and W. P. Stafford for the defendant.

The administrator *de bonis* of Brainerd Flint's estate cannot maintain this action. The heirs are the proper parties. *Potts v. Smith*, 24 Am. Dec. 359; *Sargent v. Kimball*, 37 Vt. 323; *Staughter v. Froman*, 17 Am. Dec. 33; *Alsop v. Mather*, 21 Am. Dec. 703; *Chamberlain, Admr., v. Bates, Admr.*, 27 Am. Dec. 667; *Stubblefield v. McRaven*, 43 Am. Dec. 502; *Grant v. Chamberlain*, 4 Mass. 611, 613;

Tyler v. Wheeler, 160 Mass. 206; *Curtis v. Curtis*, 13 Vt. 517.

The settlement of the account of Mary Flint in the probate court is a bar until set aside by that court. *Probate Court v. Van Duser*, 13 Vt. 140; *Rix v. Heirs of Smith*, 8 Vt. 365; *Paicher v. Bussell*, 11 Cush. 107.

No suit can be sustained against the estate of Mary Flint unless it would lie against her in her life time. *Sawyer v. Hibbard*, 58 Vt. 375; *Hatch v. Hatch*, 60 Vt. 160; *Howard and wife v. Brown*, 11 Vt. 361; *Re Estate of C. E. Benton*, 66 Vt. 507.

So long as Mary Flint was alive, the only remedy was by settlement of her account as executrix in the probate court, and that is the only remedy now. *Probate Court v. Pratt*, 1st D. Chip. 233; *Short v. Moore*, 10 Vt. 446; *Probate Court v. Vanduser*, 13 Vt. 135; *Curtis v. Curtis*, 13 Vt. 517; *Bank v. Kidder*, 20 Vt. 519; *Probate Court v. Chapen*, 31 Vt. 373; *Probate Court v. Kimball*, 42 Vt. 320; *Probate Court v. Saxon*, 17 Vt. 623; *Probate Court v. Kent*, 49 Vt. 388; *Chapen v. Ward*, 38 Vt. 628; *Adams v. Adams*, 22 Vt. 63; *Foss v. Sowles*, 62 Vt. 221; *Mirriam v. Hemingway*, 26 Vt. 565; *Com. v. Stub*, (Penn.) 51 Am. Dec. 518.

Bates & May and *John C. Burke* for the plaintiff.

MUNSON, J. In 1868, the decedent, Mary Flint, received letters testamentary on the estate of her husband, Brainerd Flint, and thereupon brought a suit as executrix upon a promissory note which was payable to the deceased, and is found to have been his property. The suit was continued the first term and settled in the succeeding vacation, the executrix receiving the full amount of the note. She returned an inventory of the estate soon after receiving her appointment, and rendered a final account of her administration in June, 1869. She made no return of the note in the

inventory, and did not account for its avails in her settlement. The heirs of Brainerd Flint had no knowledge of this note or suit until after Mary Flint's death, which occurred in 1892. No further account of Mary Flint's administration has been rendered. The plaintiff, as administrator *de bonis non* of Brainerd Flint, presented a claim for the sum so withheld to the commissioners on Mary Flint's estate; and this is an appeal from the disallowance of his claim by the commissioners.

It was held in *Davis v. Eastman*, 66 Vt. 651, that Mrs. Flint's executor could not be made to account in equity for money belonging to Brainerd Flint's estate, for the reason that it was still within the power of the probate court to complete the settlement of that estate. We think it must also be held that the amount for which Mrs. Flint was accountable cannot be determined by the commissioners on her estate. It has been uniformly held in this state that persons who are charged with the administration of funds by appointment of the probate court, cannot be sued for a non-payment of the funds until their liability has been determined by a decree of that court. *Short v. Moore*, 10 Vt. 446; *Probate Court v. Vanduzer*, 13 Vt. 135; *Curtis v. Curtis*, 13 Vt. 517; *Adams v. Adams*, 16 Vt. 228; *Bank of Orange County v. Kidder*, 20 Vt. 519; *Probate Court v. Slason*, 23 Vt. 306; *Merriam v. Hemmenway*, 26 Vt. 565; *Probate Court v. Chapin*, 31 Vt. 373; *Probate Court v. Kimball*, 42 Vt. 320; *Probate Court v. Kent*, 49 Vt. 380; *Foss v. Sowles*, 62 Vt. 221. In *Adams v. Adams*, an heir to an unsettled estate presented to the commissioners on the estate of the deceased administrator thereof a claim for his distributive share. The court said it was for the probate court to determine whether the plaintiff was an heir, whether there was any estate for distribution, and if so the amount of the plaintiff's share; and held that until these matters were ascertained by the probate court the heir could have no

claim against the administrator personally, and that consequently an action could not be sustained against his representatives.

It is apparent from these decisions that the accountability of the deceased executrix must be determined by the probate court before any other action can be taken. As we hold that there can be no recovery in this proceeding upon the facts found, we do not consider the exceptions taken to the evidence received. Nor do we pass upon the question whether the proceeding could be sustained by an administrator *de bonis non* if otherwise properly brought.

Judgment reversed and judgment for defendant; to be certified.

DAVID B. MINARD ET AL.

v.

CHARLES L. CURRIER.

WASHINGTON COUNTY, MAY TERM, 1893.

Injury to wife's real estate. Husband as party and witness. Percolating water.

1. The husband is properly joined as a co-plaintiff and may testify if so joined in a suit for an injury to the realty of the wife, which is not held to her sole and separate use; and real estate given by the husband to the wife is not so held.
2. Ordinarily a grant of land does not carry with it any right to percolating water as against the adjoining land of the grantor, but such rights may be conveyed by deed if such be the intent of the parties.
3. *Held*, that the specific grant of certain wells together with all right and title "in and to what water would naturally flow into the above described springs or wells," conveyed to the grantee a right to have the water percolate in its natural state as against a subsequent grantee of a portion of the lot upon which the wells were situated.

Case for injury to the plaintiff's well. Plea, the general issue. Trial by jury at the March term, 1893, TAFT, J., presiding. At the close of the testimony the court directed a verdict for the defendant, and the plaintiff excepted.

E. W. Bisbee and *H. A. Huse* for the plaintiff.

Whittier was properly joined as a co-plaintiff with his wife and his testimony should have been admitted. Acts of 1886, No. 45; *Smith v. Fitzgerald*, 59 Vt. 451; *Simkins v. Eddie*, 56 Vt. 612; *Babcocks v. Gilford*, 47 Vt. 519.

S. C. Shurtleff for the defendant.

The husband could not testify and had his testimony been admitted the court ought still to have directed a verdict. *Simkins v. Eddie*, 56 Vt. 612; *Wells v. Tucker*, 57 Vt. 223.

The defendant is not liable for having cut off the percolating water which ran into the plaintiff's springs. *Chatfield v. Wilson*, 28 Vt. 49; *Chatfield v. Wilson*, 31 Vt. 358; *Harwood v. Benton & Jones*, 32 Vt. 724.

MUNSON J. The only deed offered in evidence was one from S. C. Chubb to Nat Whittier and D. B. Minard, conveying an interest in certain springs or wells of water, for injuring which the suit is brought. At the opening of the case, statements were made by counsel to the effect that defendant's title was obtained from Chubb by a deed subsequent to that given the plaintiffs, and that before the injury complained of the interest acquired by Nat Whittier had been transferred to his wife.

The competency of Nat Whittier as a witness depends upon whether he was properly joined as a party. No. 45, Acts 1886. It is claimed that he was not a proper party because of the provisions of No. 140, Acts of 1884. But if this act should be given the effect claimed it would not prevent the joinder of the husband in suing for an injury to the wife's realty, unless the property was so obtained as to be held to her sole and separate use. Nothing appears in regard to the wife's acquirement of this property except that it was conveyed by the husband to a trustee and by this trustee to the wife, and no further fact will be presumed to im-

peach the correctness of the ruling below; but the facts stated indicate a probability that the transfer was a gift, and if this should be made to appear at another trial the testimony of the husband would be admissible. *Swerdferger v. Hopkins*, 67 Vt. 136. As the case is made up, we do not feel called upon to enter upon a further construction of the statute.

The plaintiff's case, upon which a verdict was directed for the defendant, discloses that the two wells in question were dug, the pipe laid from the first to the second and from the second to the buildings, and the use of the water entered upon, before the deed of the right was given; that after this deed was given, a portion of the lot near the wells was conveyed to the defendant, who dug a cellar upon it, and made an excavation in the bottom of the cellar, the bottom of which excavation was two feet lower than the bottom of the upper well; that while the cellar was being dug considerable water came into it, and that the excavation in the cellar is permanently filled with water; that a diminution in the plaintiff's supply was noticed while the cellar was being dug, that after the digging was completed it took about ten times as long for the upper well to fill after being exhausted by the syphon as it did before, and that this condition of things has since continued. It is not claimed that these places were anything more than collections of percolating water.

The defendant claims that his liability is merely that of an adjoining owner; and if he is right in this the verdict in his favor was properly directed. It is well settled that there are no correlative rights between adjoining land owners in regard to percolating water, and that one whose underground supply is cut off by the digging of his neighbor is without remedy. *Chatfield v. Wilson*, 28 Vt. 49; *Harwood v. Benton*, 32 Vt. 724.

The plaintiffs cannot recover unless it can be held that

they have acquired a right to this water, as against the defendant, greater than that of an adjoining land owner, through the prior deed of the defendant's grantor. If Chubb's conveyance gave the plaintiffs a right in these wells inconsistent with the full enjoyment of the surrounding land, then the estate acquired by the defendant through Chubb's subsequent deed is limited by the extent of the prior grant. If an absolute right to the use of percolating water is created by Chubb's deed to the plaintiffs, the case is not within the law governing the rights and liabilities of adjoining proprietors in regard to such water.

It is certain that a grant of the land containing these wells would have deprived neither Chubb nor his grantee of the right to dig upon the remaining land to the injury of the wells. A holding to the contrary would be inconsistent with the settled law upon the subject of percolating water. *Harwood v. Benton*, 32 Vt. 724 (735). But here the water afforded by the wells is the very thing granted; and the question is whether the grant secures the owner of the right from a diminution of the supply by means of other excavations.

The law refuses to recognize the existence of correlative rights in percolating water as between land owners, for the reason that the laws which govern its presence and movement are so secret, uncertain and uncontrollable, that a general regulation of the subject is impracticable. It cannot be said, however, that a right to percolating water greater than would be acquired by a deed of the land may not be created by apt and sufficient words; and if the language of this deed clearly imports such a right, the law will not refuse to recognize it.

The grantor conveys in the first place all his right and title to the springs or wells, giving a minute description of their location. He then inserts the following clause: "I also quitclaim all right and title which I have in and to what

water would naturally flow into the above described springs or wells." The phraseology is such as to preclude a holding that this was intended as a further description in a different form of the same right that had been previously granted. The expression "I also quitclaim" indicates the conveyance of something in addition to the first grant. But no such effect will be given to this sentence, if we restrict the grantee's right to the water which the wells will afford under every circumstance operating to reduce the supply. The construction above indicated is also required by the use of the word "naturally." This clearly covers the water which the wells will receive when nothing is done to intercept its passage. The natural movement of water is that which will occur if no action is taken to obstruct or divert it.

Judgment reversed and cause remanded.

M. C. BAILEY ET AL. v. JUDITH BAILEY ET AL.

OCTOBER TERM, 1894.

Trustee de son tort. Suit in equity against by heir to estate. Multifariousness.

1. If two persons jointly take possession of the real and personal estate of an insane person and manage the same, they thereby become guardians by construction, and are liable to account under the rules applicable to a trustee *de son tort*.
2. An heir of such insane person may, after his decease, maintain a suit in equity for an accounting to the estate against such intermeddlers, although one of them is the administratrix of the estate and the other has presented a claim against it.
3. Such a bill is not multifarious because it sets out particular instances in which the defendants have received moneys for which they ought to account, so long as it goes for an accounting upon their whole proceeding.

Bill in equity. Heard at the June term, 1894, Orange county, upon demurrer. Ross, chancellor, dismissed the bill with costs. The orators appeal.

R. M. Harvey for the orators.

The defendants are jointly liable and no proceeding in the probate court could reach them jointly. *Isaacs v. Clark*, 13 Vt. 657.

They are liable as trustees *de son tort* and of this the probate court has no jurisdiction. *Masse et al. v. Slason et al.*,

13 Vt. 296; *French et al. v. Windsor et al.*, 36 Vt. 412; *Barnes v. Dow*, 59 Vt. 530.

The bill is not multifarious. *I Dan. Ch.*, 336, 338; *Shaw v. Chamberlin*, 45 Vt. 465; *Smith v. Scribner*, 59 Vt. 96.

John H. Watson and Smith & Sloan for the defendants.

There is nothing in the bill to show that the probate court needs the aid of the court of chancery. *Blair, Admr.*, v. *The Heirs, etc.*, 64 Vt. 598; *Davis, Admr.*, v. *Eastman, Exr.*, 66 Vt. 651; *Angus v. Robinson's Admr.*, 62 Vt. 60.

TAFT, J. The question in this case is raised by demurrer to the bill. The orators are sons of Joseph Bailey, deceased, by his first wife. The defendant Judith is the widow of Joseph and the mother of his son Hale G., the other defendant. The estate of Joseph is in process of settlement; the defendant Judith is administratrix. Hale G. presented a demand against the estate of Joseph to the commissioners appointed to adjust claims against it, which was allowed and an appeal taken in the name of the administratrix, by one of the orators, which appeal is now pending in the county court. The orators allege that the intestate was insane for many years prior to his death in 1890, that he was incapable of transacting business, that the two defendants took and had the management and disposal of his property, and the income of his property as though it was their own, and refused to allow the said Joseph to have any control or management of it; that the said Joseph had a large claim for the care and support of Mrs. Grow, the mother of Judith, that this claim was settled privately by the defendants, and the amount received by them never accounted for. They further allege that the defendants have always acted together in the management, control and disposal of the moneys, lands and income belonging to the estate of said Joseph, and that each acted with the knowledge and agreement of the

other, and without any authority whatever, except what, if any, their relationship to him gave them, and entirely without any contract.

The prayer of the bill is that the defendants be ordered to account for all moneys and other property, including the income of the farm, and the amount which they received upon the claim for the support of Mrs. Grow, and to pay over all that may be due from them to said estate. It is claimed in the answer that the bill is multifarious; the question is not argued in the brief, but if insisted upon by the defendants, the point is not well taken. The orators are alike interested in all the matters and things set forth in the bill, and the claim is made against both defendants. The proceeding is not to compel an accounting by Judith's mother, in respect to her support, but it is an attempt to compel the defendants to account for whatever they have received from the property of Joseph, the income and profits of his real and personal estate, including what they received from the mother of Judith upon said claim against her. The bill is not multifarious.

It is argued, and this is the real question in the case, that the orators have a complete and ample remedy at law and that the matters in controversy can be adjudicated in the probate court. The settlement of estates, under our statutes is vested in that court, but equity has jurisdiction whenever its aid is required, and the powers of the probate court are inadequate to deal with the question at issue. The proceedings cannot be sustained upon the ground of discovery, for under R. L. 2157, any person who is charged with having any property of an estate, or concealing it, may be cited before the probate court and examined in reference to it. It is argued that any claim against Hale G. may be presented in set-off to his claim in the proceeding now pending in the appellate court, and that the administratrix may be charged in the settlement of her account with all proper matters in

favor of the estate against her, for which she is liable to account as administratrix. Under the allegations in the bill, the matter in controversy is a claim in favor of the estate against the two defendants jointly. To determine whether the probate court can adequately deal with this question, we must refer to the nature of the claim which is made by the bill. It is therein alleged that Joseph Bailey was insane, incapable of doing any business and was in the care, custody and control of the defendants. They intruded upon his estate, assumed control and management of it without any contract, and have had possession of the same for more than twenty years without accounting for any of the rents, income, profits or property. These are substantially the facts alleged in the bill and admitted by the demurrer; upon these facts, we must hold that the defendants made themselves trustees by construction, or guardians *de son tort*; it is immaterial which term is used in designating their character, for the terms in this respect are synonymous.

There is a class of cases in which it frequently happens that courts of equity adjudge a trust has arisen from the contracts and dealings of parties, although a trust was not within the contemplation of either party, and when there was no fraud actual nor constructive; in which respect chancery proceeds in a manner and upon principles entirely unknown to courts of law; the parties are called trustees by construction; for instances of this character, see I Perry on Trusts, Chap. 7. Among such instances, it has been held that persons may become trustees by intermeddling with and assuming the management of property, without authority; they are held to be trustees *de son tort*, in the same manner that persons who deal with a deceased person's estate without authority are executors *de son tort*. If one enters upon the lands of an individual and takes the rents, manages and carries on the property, he may be charged as a guardian, trustee or bailiff, and so may one who takes personal

property. The case of *Wyllie v. Ellice*, 6 Hare 505, is a case of such holding and the reasoning quite applicable to this. The defendant Ellice was charged as trustee, having unlawfully and without authority entered upon the plaintiff's estate and held the same, receiving the rents and profits during the plaintiff's infancy, and it was held he became thereby accountable to the plaintiff as "bailiff, guardian or trustee." The phrase "bailiff, guardian or trustee," as used, was criticised, but Wygram, V. C., observed that as he understood them, they were synonymous expressions, but whether that was so or not, they were sufficient to charge the defendant as trustee.

Holding the defendants accountable as trustee, is but the application of the familiar principle that if a person by mistake or otherwise, assumes the character of trustee, guardian, executor or administrator, and acts as such, when the office does not belong to him, he thereby becomes such official *de son tort*, and can be called to account, by the beneficiaries, for the assets received under color of the trust. "If one voluntarily assumes the situation of trustee, it does not lie in his mouth to disclaim that position." *Proprietors v. Post*, 31 Conn. 240; and there is a class of similar cases, in jurisdictions in which the executor is not entitled to the rents of the real property, in which it has been held that rents received by an executor, as such, are not regarded as assets, but are held in trust for the heir or devisee. *McCoy v. Scott*, 2 Rawle 222; *Adams v. Adams*, 4 Watts 160; *Schwartz's Estate*, 14 Pa. St. 42. In *Lefort v. Delafield*, 3 Edw. Ch. 32, the court said as to an intermeddler who, in that case was an executor, that he might be considered either as a wrong doer or as a bailiff. A person who assumes the character of a trustee incurs the responsibility of one, *Rackham v. Siddal*, 1 Mac. & G. 607; *Life Ass'n, v. Siddal*, 3 DeG. F. & J. 58. In *Bennett v. Austin*, 81 N. Y. 308, it was held that a person who was, in law, a wrong doer, and

who, without authority, assumed the management of property in which others were beneficially interested, became in equity a trustee by construction, and during the continuance of such management, was subject to the same rules and remedies as other constructive trustees. It has been held that in such cases the wrong doer could not avoid liability as a trustee by showing that he was not, in fact, such. *Wilson v. Moore*, 1 Myl. & K. 127.

Analagous in principle is the well established doctrine that "If a man intrudes upon the estate of an infant and takes the profits thereof, he will be treated as a guardian and held responsible therefor to the infant in a suit in equity." 2 *Fonbl. Eq. Bk.*, 2 Pt. 2 Ch. 2, S. I and note f.; *Bennett v. Whitehead*, 2 P. Wms. 644; *Morgan v. Morgan*, 1 Atk. 489; *Dormer v. Fortesque*, 3 Atk. 124; *Goodhue v. Barnwell*, Rice's Eq. (S. C.) 198; *Drury v. Conner*, 1 Har. & Gill (Md.) 220; *Chaney v. Smallwood*, 1 Gill (Md.) 367.

In many of these cases, the question arose whether the intermeddlers should be treated as trespassers or as trustees, etc., by construction. In such cases the doctrine seems to be as stated in *Wyllie v. Ellice*, *supra*, in which it is said that the plaintiff might treat Ellice as a trespasser or sue him as a bailiff, guardian or trustee. He might elect to treat him as either; that if Ellice had entered upon the plaintiff's property unlawfully and without authority, he could treat him as a trespasser or call him to an account in equity. That if he did the latter, he must join as defendants all who acted with him as bailiffs, guardians or trustees; that equity would require that all parties jointly liable with the defendant should be made accountable with him.

It is well to bear this in mind, for it is urged by the defendants here, that the remedy of the orators is in two separate proceedings, one against one defendant and the other against the other.

Joseph Bailey was insane, and his position was similar to

that of an infant, and the same rule should be applied to his case as to that of an infant.

The only legitimate way of dealing with his property, in the condition in which he then was, was by the appointment of a guardian, who could legally take control of the property and manage it. The defendants constituted themselves his trustees, guardians, etc., and stood in a similar relation to the deceased as a guardian, who, after his time of guardianship expires, continues without right to hold control and manage his ward's property, stands to the ward. Now, although the probate court has exclusive jurisdiction of guardians' accounts, it has been held in such cases that the ward may maintain the common law action of account against the guardian, and that the guardian by his act makes "himself bailiff of the ward's property for the time which he continues thus to hold it, and liable to account for the same in the common law action," and that if the ward chose, he could compel the guardian to account to him in the common law action, for the time after the guardianship ceased, and also could bring into the same adjustment the guardian's account which accrued during the time of the guardianship. *Field v. Torrey*, 7 Vt. 372; *Harris v. Harris*, 44 Vt. 320.

We think the powers of the probate court are not adequate to the settlement of such a controversy as is shown by the bill. It has no power to cite before it any persons who have been acting as trustees by construction or officials *de son tort* and to settle their accounts. It settles the accounts of such officials as are appointed by the court itself, and not the controversies that arise when one has intermeddled with the estate of an infant, insane person, or a trust. The aid of the court of equity may well be invoked in this proceeding. In this case, for the reasons stated, the orators have the right to have the controversies settled in one proceeding instead of compelling them to proceed in the probate court and in the appellate court, in proceedings against the two defend-

ants separately, and it is doubtful if the probate court have power to settle and adjust the equitable claims set forth in the pleadings, for the probate court are given power to hear and determine in equity, those matters only, relating to the trusts mentioned in R. L., Chap. 119, and those named therein do not include such as are created by the intermeddling of volunteers. The matter of trusts is peculiarly within the jurisdiction of equity. That a suit at law cannot be maintained in this matter must be apparent to every one, as the suit must be brought in the name of the administratrix against herself and another.

Treating Hale G. Bailey as a guardian or trustee *de son tort*, and that the probate court could properly settle his account as such, the claim against him—if several—cannot be pleaded in set-off to the claim presented by him against Joseph Bailey's estate, for commissioners do not have the necessary powers to dispose properly of the various questions that may naturally arise in the adjudication of a deceased guardian's account. *Waterman v. Wright*, 36 Vt. 164. And the same difficulty arises when such an account is presented in set-off to a claim pending before commissioners in favor of a guardian against the estate of a deceased ward. A probate court never settles the account of an official *de son tort*. There is, therefore, no remedy against Hale G. Bailey in the probate court.

Decree reversed, demurrer overruled, bill adjudged sufficient, and cause remanded.

Rowell, J., dissents.

STATE v. WILLIAM SPEYER.

JANUARY TERM, 1895.

*Power of legislature to make regulations for public health.
Reasonableness for the court. Pigpens.*

1. The legislature may prevent the introduction and spread of contagious diseases, and the necessity and propriety of particular regulations to that end are primarily a question for legislative determination; but whether such regulations are reasonable, impartial, and consistent with the state policy is a question for the court.
2. A regulation by the State Board of Health under legislative authority, applicable to the whole state without reference to location or condition, that no one shall maintain a pigpen within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of any street or inhabited house, is unreasonable and void.

Information for keeping and maintaining a pigpen within one hundred feet of an inhabited dwelling. Heard at the December term, 1894, Addison county, TYLER, J., presiding. The respondent filed a general demurrer. This was overruled and the respondent ordered to plead over, to which the respondent excepted. Thereupon the respondent plead not guilty and a trial by jury was had. The state proved due notice from the State Board of Health and the maintaining of the pigpen within one hundred feet of a dwelling house, but did not show the existence of any epidemic or contagious diseases in the vicinity, nor that the pigpen was maintained in a manner to promote such diseases.

The respondent moved the court to direct an acquittal and excepted to its refusal to do so. The jury returned a verdict of guilty. The respondent then moved in arrest of judgment. The court overruled the motion and gave judgment on the verdict, to which the respondent excepted.

Button & Button for the respondent.

The regulation was an unwarrantable exercise of the public power and void. *Prent.*, Police Powers, 7, 111; *Tiedman's Lim.* Police Powers, 297, 434, 435; *Parker & Worthington's Pub. Health and Safety*, pp. 272, 292, s. 45; *Greensboro v. Ehrenreicht*, 80 Ala. 583; *Kosciusko v. Stoneberg*, 68 Miss. 469; *Ex parte O'Leary*, 65 Miss. 80; *Miller v. Horton*, 141 Mass. 543; *Coe v. Schultz*, 47 Barb. 69; *Well v. Ricord*, 24 N. J. Eq. 175; *Pryer v. Des. Plaines*, 18 Ill. Ap. 229; *In re Sam Lee*. 31 Fed. Rep. 680; *State v. Fisher*, 52 Mo. 178.

The legitimate exercise of a legitimate business cannot be prohibited. *C. & P. Rd. Co. v. Foliet*, 79 Ill. 44; *Park & Worthington, Public Health and Safety*, s. 251; *Tiedman's Lim.*, Police Power, 197; *Austin v. Murray*, 16 Pick 125; *Beebe v. State*, 26 Ind. 501.

Whether a police regulation is reasonable is always open to the inquiry of the court. *Tiedman's Lim.*, Police Power, 13, 197; *Park & Worthington, Pub. Health and Safety*, 68; *Forster v. Scott*, 136 N. Y. 577; *Lake View v. Rose Hill Co.*, 70 Ill. 195.

F. L. Fish, State's Attorney, for the state.

The regulation was not as matter of law or fact an unreasonable one. *City of Cedar Rapids, v. Holcomb*, 68 Iowa 107; *Commonwealth v. Young*, 135 Mass. 526; *Quincy v. Kennard*, 151 Mass. 563; *Commonwealth v. Patch*, 97 Mass. 221.

START, J. The information charges that the respondent kept and maintained a pigpen within one hundred feet of an inhabited dwelling house, in violation of a regulation made by the State Board of Health. To this information the respondent demurred. The demurrer was overruled, information adjudged sufficient, and the respondent ordered to plead over; to which the respondent excepted.

No. 93, Sec. 6, of the Acts of 1886, as amended by No. 82, Sec. 11 of the Acts of 1892, provides that the State Board of Health shall have authority to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as they shall judge necessary; and any person or persons or corporation neglecting or refusing, after having been duly notified in writing, to comply with the requirements of such regulations shall, upon conviction thereof, pay to the treasurer of the state a fine of not less than twenty-five dollars nor more than one hundred dollars. Acting under the authority conferred by these enactments, the Board of Health promulgated a regulation that no pigpen should be built or maintained within one hundred feet of any well or spring of water used for drinking purposes, nor within one hundred feet of any street or inhabited house.

The power of the legislature to prevent the introduction and spread of infectious and contagious diseases cannot be questioned. All property in the state is, undoubtedly, held subject to the reasonable supervision of legislative authority, to an extent necessary to the reasonable preservation of the public health. While the necessity and propriety of particular regulations are primarily of legislative determination, their character, whether reasonable, impartial and consistent with the state policy, is a question for the court. Tiedman's *Lim. of Police Power*, 13, 197; *Parker & Worthington's Public Health and Safety*, 68; *Dill. Mun. Corp.*, Secs. 319,

325, 329; *Mugler v. Kanoar*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313. By the enactment in question. the legislature attempted to confer upon the State Board of Health power to promulgate and enforce reasonable regulations in respect to contagious and epidemic diseases and causes which tend to their development and spread. If the Board of Health, in promulgating the regulation in question, were in the reasonable exercise of the power attempted to be conferred upon them, all pigpens built or maintained within one hundred feet of any well or spring of water used for drinking purposes, or within one hundred feet of any street or inhabited house, must be regarded as infected with contagious or epidemic diseases, or causes which tend to their development and spread; or, under such circumstances, it must be inferred that there are reasonable grounds for apprehending that they are thus infected or are such causes.

A regulation so general and far-reaching, affecting business and the use of property, cannot be held to be reasonable or justifiable, unless there are reasonable grounds for a belief that the necessary protection of the public health requires it. The regulation in question cannot be held to be reasonable or justifiable, because some few individuals in the state maintain a pigpen in such a manner as to endanger public health. To justify promulgating such a regulation, there must be reasonable grounds for apprehending that all pigpens affected by it are, or may be, a menace to public health. It cannot be said that all pigpens situated within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of a street or inhabited house, endanger public health, or that there are reasonable grounds for apprehending that they do. They may or may not thus endanger the public health. Very much depends upon the manner of construction, the way they are kept and occupied, the means for keeping them

clean, the location and surroundings, the character and slope of the land, their nearness to or remoteness from thickly settled communities, and the existence or non-existence of diseases and causes of diseases. A pigpen may be a menace to public health when situated in a city or village, and perfectly harmless when situated upon a farm; and the fact that a pigpen situated in a city or village is a nuisance and endangers public health and ought to be abated, furnishes no reasonable ground for abating a pigpen upon a farm, which is not a nuisance and in no way affects the public health. The regulation, if valid, had the effect to abate and cause to be removed every pigpen within the prohibited limit. It deprived every owner of land, within the limit, of its use for purposes that, under proper conditions, are harmless and legitimate. By it, the citizen living miles from neighbors and from epidemic diseases and causes which tend to their development and spread, and whose possessions do not extend beyond the prohibited limit, is unreasonably and unjustly deprived of his right to build and maintain a pigpen and engage in a business which has ever been regarded, when conducted under proper conditions, as legitimate.

The regulation is intended to have force and effect throughout the entire state. It affects alike those pigpens which are, as a matter of fact, maintained in such a manner as to be offensive, and those which are maintained with every possible degree of cleanliness; it affects alike those situated upon farms and those situated in thickly settled communities; and it affects all pigpens within the prohibited limit, without reference to the existence or non-existence of epidemic or contagious diseases, and the causes which tend to their development and spread in any particular locality. It is intended to affect alike a business which is so conducted as not to be a nuisance or in any way endangering public health, or furnish reasonable grounds to apprehend that it

will do so, and business which is so conducted as to be a nuisance and furnish reasonable grounds for a belief that it will endanger public health, if continued. If reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property. It is founded on fear and apprehension of a remote possible danger to the public health, and not upon its existence, or upon reasonable grounds to apprehend that any considerable portion of the pigpens affected by it endangers or will endanger public health. It is an unreasonable and unjust interference with a legitimate and recognized business pursuit and use of property, without reference to its location or the manner in which it is conducted, or the existence or non-existence of epidemic or contagious diseases or causes which tend to their development and spread in any particular locality. It is too broad and sweeping to be upheld by any necessity of protecting the public health, and we cannot regard it as a reasonable and legitimate exercise of the power attempted to be conferred by the enactments in question.

Judgment reversed; demurrer sustained; information adjudged insufficient and quashed; respondent discharged.

Taft, J. concurs in the result. The keeping of pigs, not pigpens, is the evil. The board had no authority to prohibit the building of a pigpen.

L. F. WILBUR v. CYRUS PRIOR.

JANUARY TERM, 1893.

Note procured by fraud. Promise not to collect. Fraud without injury.

1. While a promise by the payee at the time of obtaining a promissory note not to enforce it, cannot be shown in defence to a suit on the note, it may be shown that the note was obtained by fraudulent representations of which the statement that it should be returned to the maker before maturity was one.
2. *Held*, that the evidence tended to show such fraudulent representations.
3. The defendant was surety on the bond of a town constable who had made default in the service of process. The plaintiff, as the attorney of the party damaged by such default, fraudulently induced the defendant to give the note in suit for the amount of the default. *Held*, that it could not be affirmed as matter of law that the defendant was not injured by the fraud, for his liability as bondsman might never have been established against him.

Assumpsit upon a promissory note. Plea, the general issue with notice of special matter. Trial by jury at the April term, 1892, Chittenden county, TAFT, J., presiding. The court directed a verdict for the plaintiff; to which the defendant excepted. The opinion states the case.

Henry Ballard and J. J. Monahan for the defendant.

L. F. Wilbur, S. Haselton and W. L. Burnap for the plaintiff.

A contemporaneous agreement not to collect the note could not be shown. *Conner v. Carpenter*, 28 Vt. 237 and note; *Morse v. Low*, 44 Vt. 561; *Gillett v. Ballou*, 29 Vt. 296.

MUNSON, J. The defendant conceded the execution of the note in suit, but claimed that it was without consideration and procured by fraud. The court directed a verdict on the ground that there was no evidence tending to show that the note was fraudulently procured, and the defendant excepted to the action of the court in directing a verdict. In considering the correctness of this ruling we are to assume the truth of that part of the testimony which tends to support the defendant's claim.

The defendant was one of three sureties on E. D. Butler's bond as constable of Underhill for the year 1882. During that year Butler served a writ in favor of William Early against Michael Stokes by attaching certain personal property, a part of which was sold as perishable and a part by agreement of the parties. Both parties were present at the sale with their attorneys, Wilbur being the attorney of Stokes. A part of the property was bid off by Early and a part by Wilbur, and by agreement of all concerned the funds were left in the hands of the bidders to await the determination of the suit. The suit was terminated in 1886, by a judgment in favor of Stokes. Butler left the state in 1884, and had no further knowledge of the suit until 1888, when he was informed by Wilbur that a judgment had been obtained by Stokes, and that he had sued the town because of its constable's failure to account for the avails of the sale.

The defendant in this suit had no knowledge of these matters until Wilbur wrote him in regard to them. In his letter Wilbur informed defendant that he had a claim to enforce against Underhill for the default of its constable, that he understood defendant was one of the constable's bondsmen, and that he thought he knew a way by which

defendant could save himself, of which he would inform him if he would meet him at a time and place named. At an interview brought about by this suggestion, Wilbur told the defendant that he was about to bring a suit for Stokes against the town on account of Butler's default, that defendant would be liable as one of the bail, and that he thought he could help him out of it; that if he would sign a note for the amount of the claim he would get a power of attorney from Butler to collect the money due from Early, and would obtain payment in that way. *The defendant refused to give his note, and Wilbur afterwards visited his house several times and urged him to do so. On the last of these visits Wilbur told him he had got Butler's authority to collect the money of Early, that he wanted to have defendant's note to show the town that the suit pending against it had been settled, and that after the suit was disposed of he would collect the money of Early, and then return the note to defendant. The defendant again refused to give his note, but at Wilbur's request agreed to meet him at a hotel the next morning. At their interview in the morning Wilbur told the defendant that the giving of the note should not cost him a cent, that he would collect the money of Early at his own expense, and would return the note to defendant when due or before. The defendant then gave the note in suit, influenced as he says by the representations of the plaintiff.

This was four days before the return day in the suit of Stokes against the town. According to defendant's testimony, Wilbur always urged upon defendant that he say nothing to any one about the matter, and in consequence of this defendant made no inquiries and knew nothing except what Wilbur told him. The town considered that it had a good defence to the suit, and was preparing to contest it. At their interview at the hotel Wilbur produced an assignment from Butler to the defendant of the claim against Early, which defendant then refused to take, but retained

when afterwards sent him by mail. At Wilbur's suggestion defendant procured one Woodworth to see Early and notify him of the assignment, and in a subsequent settlement defendant paid Woodworth for this service. Stokes was owing Wilbur a considerable amount for legal services, and whatever was obtained on this claim was going to Wilbur. It does not appear that after this note was given either Wilbur or the defendant did anything as regards Early's liability.

Upon this review of the testimony favorable to the defendant, we think it must be held that there was evidence tending to show that the plaintiff had doubts as to the liability of the town, and wished to get the claim satisfied in some way without incurring the publicity or uncertainty of a trial; and that he procured this note by falsely representing that it was to be used only for the defendant's protection and in the manner specified, and would afterwards be returned to him. This tendency of the defendant's testimony is not overcome by his statements that an assignment of the demand against Early was taken in his name and remained in his hands, and that the notice to Early was given by his direction and at his expense. The assignment to the defendant, if defendant's version is adopted, was what Wilbur's plan contemplated. His whole talk was that everything must be done in the defendant's name, the same as if the defalcation was being satisfied by defendant in reality as well as in appearance. The jury might believe the defendant's account of the transaction, notwithstanding the fact that he suffered the assignment to remain in his possession when mailed to him by Wilbur, and notwithstanding the fact that in a general settlement afterwards had with Woodworth he suffered Woodworth's charge for giving the notice to stand without question.

We think the representations which this evidence tended to establish were such as would avoid the note. If the only tendency of the testimony was to show a promise not to en-

force the note, it would be of no avail. But the maker of a note delivered upon such a promise is not barred by the rule applicable to the promise from showing that the note was procured by deceitful practices of which the promise was a part. This view is not at variance with the decisions in *Gillett v. Ballou*, 29 Vt. 296, and *Conner v. Carpenter*, 28 Vt. 237. Neither of these cases involved the question of fraud in the procurement of the writing. In the latter case the plaintiff gave the defendant a writing which the plaintiff offered to show was understood to be a sham, and designed merely to deter the plaintiff's creditors from attaching his property; and the offer was disposed of as an attempt to contradict the writing. But we take it the ruling would have been different if evidence had been offered which tended to show that the defendant had conceived the idea of taking advantage of the plaintiff's situation to obtain a writing for ultimate enforcement, and had approached him with that design in his mind and words of disinterested friendship in his mouth, and had worked upon his fears regarding his financial condition, and then obtained the paper upon a promise not to use it. It cannot be said but that if all the evidence favorable to the defendant were believed, the jury might legally have drawn corresponding inferences in this case. And there being evidence tending to show that an imposition of this character was practiced on the defendant, it is not necessary to find evidence tending to show the plaintiff guilty of a material misrepresentation or concealment in regard to the defendant's situation. The facts of an existing situation may be correctly stated, and yet be made the basis of a cognizable fraud. The scope of the plaintiff's representation was broader than the question of the defendant's liability. The evidence tended to show that he obtained the note by falsely pretending that he had devised a plan for the defendant's protection, and that his possession of the defendant's note was essential to the carrying out of his plan. It tended to

show a statement that the note was to be used only for a specified purpose, and a contemporaneous intention to use it for an entirely different purpose.

But it is insisted that the defendant has merely given his note for his own obligation, and consequently has suffered no damage. Assuming that the constable was in default, and that Stokes and Wilbur were not estopped from asserting it, and that the town was legally holden, and that the loss was chargeable to the year for which the defendant was surety, can it be said that the defendant has sustained no injury? We think not. Even though the town was liable and the bond chargeable with the loss, the defendant may have suffered by conceding his liability when he did. If the proceedings had been allowed to take their course they might never have reached the defendant. Stokes might have abandoned his suit upon becoming satisfied that the town intended a vigorous defence. If judgment had been obtained against the town, and the constable had become satisfied that nothing could be got from Early, he might have raised the money to protect his bondsmen. If the town had had the money to pay, it might never have sued the bond. If it had decided to sue, it might have proceeded against the other sureties, and the defendant have ultimately escaped. If the defendant had considered that a suit against him was certain, he might have preferred to wait in the expectation that all the sureties would be sued jointly. The defendant had a right to the benefit of these contingencies, if he preferred to take the chances of delay rather than concede a liability and make immediate payment. The fact that a suit had been brought upon an enforceable claim on which the defendant could ultimately be made liable affords no ground for saying that he was not harmed by the representations relied upon. Whatever the situation of the defendant may have been, he was under no obligation to give his note.

We are not called upon to consider what chance this evidence had of being believed by the jury when viewed in connection with the testimony of the plaintiff. The question for us is whether there was any evidence which tended to show that the note in suit was fraudulently procured.

Judgment reversed and cause remanded.

W. C. SMITH ET AL. v. O. A. BURTON ET AL.

MAY TERM, 1895.

Appeal. Motion for carries without allowance by chancellor. Receivership. Sale. Practice. Encumbrance.

1. A chancellor has no power to allow or deny an appeal from his decree. If the decree is one from which an appeal can be taken, the mere filing of a motion therefor secures it.
2. In this instance, upon the request of all parties, the court considered the case as properly before it on appeal, without inquiring whether the decree was such that an appeal would lie.
3. A court of equity can decree the sale of property in the hands of a receiver when necessary to preserve the interests of all parties, although the rights of the parties to the property have not yet been adjudicated.
4. Such sale may be decreed without any special petition therefor where the bill itself prays for a sale and a receivership pending the sale.

5. The residuary legatee filed a written request in the probate court, before the settlement of the executor's account, that the residue of the estate, without the amount thereof being determined, might be decreed to the executor. Thereupon the probate court, upon due notice to all interested, determined that the amount of the estate was sufficient to pay all debts and specific legacies, and ordered the executor to pay the same and hold the balance of the estate as requested by the residuary legatee. *Held*, that by this decree, unappealed from, the creditors and specific legatees lost their lien upon the property of the estate not specifically devised, so that they were not necessary parties to a suit in equity concerning a portion of it, and that the same might be sold under order of the court clear from liens and incumbrances.

Appeal from an order of the court of chancery for the county of Franklin at the April term, 1895, directing the sale of certain receivership property, ROWELL, chancellor. Edward A. Sowles and Margaret B. Sowles appeal. The opinion states the case.

Wilson & Hall, for the orators.

Farrington & Post for Burton's estate.

After the decree of the probate court neither the legatees nor creditors of Hiram Bellows had any lien upon this property. *Bellows v. Sowles*, 57 Vt. 411; *Weeks v. Sowles*, 58 Vt. 696; *Witters, Rec., v. Sowles, Exr., et al.*, 32 Fed. Rep. 130, 135; *Sowles v. Witters, Rec.*, 39 Fed. Rep. 403, 408; *Carbell v. Hopkins*, 41 Vt. 250.

The court having jurisdiction had power to order a sale. *High, Receivers*, ss. 15, 192, 196; *Crane v. Ford*, Hop. Ch. 114; *First National Bank v. Shedd*, 121 U. S. 87; *Miller v. Sherry*, 2 Wall. (69 U. S.) 237; *Libby v. Rosecrans*, 55 Barb. 219, 220.

E. A. Sowles and H. A. Burt for the appellants.

The court could not make an order of sale except upon petition. High, Receivers, s. 197; *Bank v. Burnham*, 58 Mich. 315; *Sherman v. Lyon*, 2 How. U. S. 43; Rorer on Jud. Sales, s. 66.

The court must have jurisdiction both of the subject matter and of all persons in interest. Rorer on Jud. Sales, s. 71, n. 1; High on Receivers, s. 196; *Tinch v. Hoyt*, 6 N. H. 370; *Dullon v. Hudson*, 6 Cow. 222; *Sibley v. Waffle*, 16 N. Y. 185; *Gibbs v. Shaw*, 17 Wis. 197.

ROSS, C. J. The defendants, Edward A. Sowles and Margaret B. Sowles, his wife, filed a motion for an appeal from the decree of the chancellor authorizing a sale of the property involved in this litigation, now in the hands of the receiver. The chancellor denied the motion. It is unnecessary to consider whether the chancellor should have allowed the appeal. If the decree was one from which an appeal could be taken, the motion brought the case before this court. The solicitors for the orators and for defendant Burton, the parties asking that a sale of the property be decreed, do not now oppose the allowance of the appeal. Such exigencies have arisen that all the parties to the suit desire the opinion of the court upon the right and power of the chancellor to make the decree, authorizing a sale of the property. Hence we have not considered whether the decree was such that the motion brought the case here. By request of the solicitors, representing all parties, we treat the case as properly before this court on an appeal from the chancellor's decree. The solicitor for the defendants, Sowles, has made some question whether all the parties to the suit were present and represented in this court. One of the orators, the trustee Foster and the defendant O. A. Burton, have deceased, but their legal representatives have now been made parties and are represented by solicitors. Such entrance and appearance obviates this objection. This

brings us to a consideration of the right and power of the chancellor to decree a sale of the property free and clear of incumbrances, upon the case as made by the pleadings. The pleadings are somewhat voluminous. Only such portions of them will be stated as are involved in the consideration of the contention made by the appellants.

The property is the Tremont House property in the village of St. Albans. The orators claim to have acquired an equitable interest in it through the payment of subscriptions for the fitting up and the establishment of a shirt factory on the property, under a contract and a trust deed of the property from Oscar A. Burton, and Edward A. and Margaret B. Sowles, to Geo. W. Foster, and pray to have their equitable rights therein determined and made a charge upon the property. The bill admits that defendants may have equitable interests therein; the orators pray that these interests may be determined; that the property may be sold; that the proceeds may be divided among them according to their respective rights, and until such sale, that it may be placed in the hands of a receiver. The bill was brought in 1887. A receiver was duly appointed and has managed the property from the fall of 1887 until the present time. The rents received have not been sufficient to pay the expenses of the receivership, necessary repairs, insurance and taxes. The receiver's debt is about two thousand dollars. The building on the lot, and from which the rents have mainly come, was recently destroyed by fire. Probably over two thousand dollars will be received from the insurance of four thousand dollars which was upon it. The chancellor, upon hearing and personal inspection, decided that it was injudicious and opposed to the interests of the parties, to order it to be repaired or rebuilt. There exists an opportunity to sell the property in its present condition. We think there can be no doubt in regard to the judiciousness of the decree, provided the chancellor had the power

to order it to be made. On the question of the power of the court of equity to decree a sale of property in the hands of a receiver, Mr. High, in his work on Receivers, s. 192, says: "A court of equity appointing a receiver to take possession of property, pending a litigation, concerning the rights of the parties thereto, is vested with the power of selling the property in the receiver's hands, whenever such course becomes necessary to preserve the interests of all parties." *Crane v. Ford*, Hopk. Ch. 114; *First National Bank of Cleveland v. Shedd*, 121 U. S. 74. The facts already stated bring the decree within this rule. While the property was in a condition to produce rents, its management through a receiver did not increase, but slowly and surely lessened the *corpus* available for the parties interested.

The appellants contend that the court did not have jurisdiction of all the parties necessary to make such a decree. By their answers to the bill, and by the cross-bill of Margaret B. Sowles, it is conceded that the title to this property formerly was in Oscar A. Burton and Hiram Bellows. Mr. Burton when this bill was brought was alive and owned his undivided half of the property. His estate is now represented. Hiram Bellows deceased before the conveyance, heretofore mentioned in trust to George W. Foster. By his will, which was duly probated, he gave the residue of his estate to Susan B. Bellows, his wife. Susan B. Bellows also deceased and by her will, duly probated, gave the residue of her estate to Margaret B. Sowles. Edward A. Sowles was the executor of both wills. The appellants contend that the creditors and legatees under these wills have an interest in the Hiram Bellows undivided half of this property; that they are not made parties to this proceeding, and therefore the chancellor could not decree a sale of the property free and clear of all liens and encumbrances. The property is not specifically devised by either will. Whether Edward A. Sowles, the executor of these wills, so far rep-

resents the creditors and legatees of these estates that they would be legally bound by the decree need not be considered. Susan B. Bellows, the residuary legatee under Hiram Bellows' will, died before the decree of the probate court settling the executor's administration account and distributing the estates. Margaret B. Sowles, the residuary legatee under the will of Samuel B. Bellows, also the residuary legatee under the will of Hiram Bellows, in case Susan B. Bellows did not survive to take as such residuary legatee, filed a written request in the probate court to have it decree the residue of the Hiram Bellows estate to Edward A. Sowles, the executor of Susan B. Bellows' will, without finding any definite amount, and without any inventory or specifications of the items of such residue, and also to make a like decree to her of the residue of Susan B. Bellows' estate. Thereupon, on due notice to all parties, the probate court settled Edward A. Sowles' account of administration on both estates, found there was property in the executor's hands sufficient to pay the creditors, and all the general and specific legacies named in the wills, including the legacy of the residue; ordered the executor to pay the creditors and legatees, and to pass the residue of each estate in accordance with the request of Margaret B. Sowles. No appeal was taken from these decrees. They freed the property of the estates, not specifically devised, from any lien or right to follow it by the creditors or general legatees. Except so far as the executor had used the property of the estates for the payment of the creditors and general legatees, they left the property in the hands of the executor to be used for these purposes and to pass the residue over to his wife, Margaret B. Sowles, who had consented that the residue might be thus left in his hands, and she would look to him therefor. By these decrees the creditors and general legatees, including the residuary legatee, lost all right to follow this property, or resort to it, in payment of their claims, ex-

cept as the property of Edward A. Sowles. Edward A. Sowles became obligated to them to pay their claims and legacies. This, in substance, has been held by this and the federal court. *Weeks v. Sowles*, 58 Vt. 696; *Witters v. Sowles*, 32 Fed. Rep. 130, 771; *Sowles v. Witters*, 39 Fed. Rep. 403. Hence the half of this property which formerly belonged to Hiram Bellows, under the decrees of the probate court, has become vested, either in Edward A. Sowles, because required to be used by him for the payment of the debts and general legacies, or in his wife, Margaret B. Sowles, the residuary legatee. Both are parties to this suit. So far as is disclosed by the pleadings and proceedings, there exist no parties having a legal or equitable interest in the property, except those who are parties to the bill, or persons who, by proceedings commenced subsequently to the bringing of the bill, are attempting to seize the rights of one or more of these parties. The contention that the court of chancery did not have jurisdiction of all necessary parties to enable it to make the decree is not sustained.

The prayer of this bill is for a sale, and until such sale can properly be made, that the property be placed in the hands of a receiver. Under such a bill, it is unnecessary for the receiver to file a petition praying for the sale of the property. The receivership is created in aid of a bill already filed by the parties interested praying for such sale. The solicitor for the appellants has instanced many cases where the court would not have power to order such a sale. But they do not fall within the admitted facts of this case. Among other things he contends that under the decree distributing the estate of Susan B. Bellows, he was ordered to hold \$5000 of the estate in trust for St. Luke's Church. If so, he is here to protect that interest. But his answer to the bill does not set up that he holds this property as such trustee. He further contends that no sale should be ordered until the rights of the respective parties to the property are

ascertained and established, and cites cases where the proceedings are controlled by statutes, and perhaps, some not so controlled, in support of this contention. There is no statute controlling the court of equity in such proceedings in this state. They fall under the general principles quoted from *High on Receivers*. If this contention should be sustained, and the past diminution of the fund under the receiver's management, and delay of the parties in establishing their rights, continue, the court of equity would have but little, if any, of the original fund to distribute to the parties. The decree leaves the sale to be approved by the chancellor, and the parties' rights to the fund to be determined by subsequent proceedings. It places the fund in contention, where it will not be consumed by management, but where it will probably be added to by interest received. It is manifestly for the benefit of all interested that the property should be sold while there is a demand for it, and before the rights of the respective parties thereto are determined. It is also manifest that if the alleged rights of the orators are established, the property would have to be sold, and if they should fail to be established, that the rights of Burton's estate and of the appellants therein, cannot be adjusted without a sale of the property. Burton's estate is asking that the sale be decreed and made. Where the property cannot equitably be divided, one tenant in common, both at law and in equity, has the right to demand its sale.

Decree affirmed and cause remanded.

ROLLIN AMSDEN v. FITCH & ENRIGHT.

MAY TERM, 1895.

Insolvency. Fraudulent conveyance. Practice. Evidence.

1. The suit being to recover property conveyed in fraud of the insolvency law, the amount of debts due the insolvent is material and the exclusion of evidence upon that subject error.
2. *Held*, that evidence that a part of the proceeds from the property conveyed was used to pay a note of the insolvent should have been admitted.
3. As bearing upon his intent, the one taking the conveyance may state that he had no doubt that the insolvent would pay his debts in full.
4. A judgment upon the direction of a verdict will be reversed, if the court during the trial excluded evidence tending to support the cause of action upon the part of the adverse party.
5. The sale by a retail dealer of his entire stock in trade is not made in the ordinary course of business and is *prima facie* in fraud of the insolvent law under R. L. s. 1861.

Trover for a stock of goods. Plea, the general issue. Trial by jury at the December term, 1894, Windsor county, Ross, C. J., presiding. At the close of the testimony the court directed a verdict for the defendants. The plaintiff excepts.

Prior to November, 1893, one Whitcomb had kept a furniture store in the village of Windsor. In April of that year he and his partner executed a note to the Windsor Savings Bank for five hundred dollars, procured defendants to indorse

the same as sureties and secured them for so doing by giving them a chattel mortgage upon their stock in trade. In August he bought out his partner, agreeing to pay the debts of the concern. November 10 he sold his entire stock to the defendants, who on the same day sold it to another firm of furniture dealers in Windsor. It was conceded that Whitcomb was then actually insolvent, and he was subsequently so adjudged and the plaintiff appointed his assignee, who brought this suit, claiming that the conveyance was void as against insolvency proceedings. The questions upon the admission of evidence appear from the opinion.

Gilbert A. Davis for the plaintiff.

This sale was not in the regular course of business and was *prima facie* void. *Reed, assignee, v. Moody*, 60 Vt. 668, 672; *Leach, assignee, v. Burlington Savings Bank*, 64 Vt. 626; *Tapscott v. Lyon*, (Cal.) 36 Pac. Rep. 225; *Reynolds v. Weiman*, Texas Civ. App. 25 S. W. Rep. 33; *Hargadem v. Davis*, Texas Civ. App. 26 S. W. Rep. 424.

W. E. Johnson and *William Batchelder* for the defendants.

What the insolvent did with the proceeds of the sale was immaterial. His acts after the transaction was completed could not affect the defendants. *Jones*, Chat. Mort., s. 775a; *Beck v. Parker*, 65 Penn. 262; *Phoenix v. Ingraham*, 5 Johns. 412.

TAFT, J. The court excluded testimony offered by the plaintiff. If it was material and pertinent, tending to support the plaintiff's cause of action; such exclusion was error, notwithstanding the court ordered a verdict for the defendants.

I. The amount of the property of Whitcomb, the insolvent

ent, was a material fact. That he was insolvent was conceded. Whether the amount of the accounts due him in his business was large or small might be an important factor in determining whether one taking a conveyance of any of his property had reasonable cause to believe him insolvent, and in determining the intent with which he took the conveyance. It was error to exclude the testimony to show that the amount of the accounts due the insolvent was two hundred and five dollars.

II. At the time Enright and Fitch took the conveyance of the property of the insolvent, Enright knew of the latter's indebtedness upon the Rix note; the testimony tending to show that an arrangement was immediately thereafter made, by which the Rix note was to be paid out of the proceeds of the sale to the defendant, was excluded. We are of opinion that the testimony tending to show the disposition of the proceeds of the sale, in this respect, was material, and it was error to exclude it. What became of the property, or proceeds of it, after it went into the defendants' hands might throw some light upon the intent with which they took the conveyance, and whether the conveyance was taken in fraud of the insolvent laws.

III. As bearing upon the intent with which the defendant, Fitch, took the conveyance we think it was legitimate for him to state he had no reason to doubt but that Whitcomb would pay his debts in full. It was not the question that the jury were trying. The question before them was whether he had reasonable cause to believe Whitcomb was insolvent. He may, in fact, have believed Whitcomb could pay his debts, but at the same time been chargeable with reasonable cause to believe him insolvent. A person may have property enough to pay his debts in full and still be an insolvent, *i. e.*, unable to meet his obligations in the usual way, when they mature. There was no error in permitting him to answer

this question. These are the only questions of evidence made by the brief for the plaintiff.

IV. Holding that the testimony offered by the plaintiff was improperly excluded requires a reversal of the judgment, but in ordering a verdict we think the court erred. R. L. s. 1861 provides that the sale of property by a person being insolvent or in contemplation of insolvency not made in the usual and ordinary course of business shall be *prima facie* evidence of fraud. The sale by a retail dealer of his entire stock in trade is not made in the ordinary course of business. *Read v. Moody*, 60 Vt. 668. As the sale to the defendants was of the insolvent's entire stock in trade, the case could not have properly been taken from the jury, since a *prima facie* case was made out.

What rights of the defendants, under their chattel mortgage, if any, they could avail themselves of, in this action, or what damages the plaintiff is entitled to, if he recovers, are questions not mooted upon the trial below. We therefore do not consider them.

Judgment reversed and cause remanded.

G. U. NORTON v. R. C. PARSONS ET AL.

MAY TERM, 1895.

Leading questions may be asked when one is called to contradict a witness. Examination of witnesses. Cross-examination. Amendment to bill in equity.

1. For the purpose of showing that the words "Rock Island Whip Co." referred to a former company and not to the one in which the orator and defendant, St. Pierre, were partners, the orator testified that the lawyer who drew the articles had said in the presence of himself and St. Pierre that the words had that meaning. Thereupon St. Pierre was inquired of whether he ever heard such a suggestion, and the answer was taken subject to the orator's exception, that the question was leading and incompetent. *Held*, no error, for, so far as the witness was called to contradict the orator, he might be inquired of leadingly, and as to the further scope of the answer the orator was not harmed.
2. A witness may be asked whether he heard certain words or "that in substance," for this refers to the substance of the words and not their meaning.
3. When the objection to a question is such that it can be obviated, correct practice requires that the ground of the objection should be stated.
4. *Held*, that the orator's right of cross-examination was not abridged in case of a witness who had answered that he could not tell, before the master ruled that he need not answer.
5. As a rule, no amendment should be allowed upon final hearing which changes the substance of the bill.

Bill in equity. Heard upon the pleadings, a master's re-

port, and exceptions of both parties thereto, at the September term, 1894, Orleans county. TYLER, chancellor, overruled the exceptions and dismissed the bill as to both defendants. The orator appeals.

The orator had for some time been engaged in the whip business at Derby Line previous to March 1st, 1889, under the firm title of the Rock Island Whip Company. About that time he formed a copartnership with the defendant, St. Pierre, and the business continued to be conducted after the formation of said partnership as it had been before, under the title of the Rock Island Whip Company. The orator alleged in his bill that about July 1st, the defendant, St. Pierre, without his knowledge or consent, took goods belonging to the partnership to the value of one thousand dollars, and sold them to the defendant, Parsons, for about five hundred dollars and delivered them to the defendant, Parsons; that said pretended sale was not made in due course of business nor *bona fide*, nor with the knowledge and consent of the orator, but that St. Pierre delivered and Parsons received the goods and converted them to his own use, well knowing that St. Pierre intended to defraud the orator by the means.

The orator prayed that the court would ascertain the value of said goods and decree payment for the same to the orator for the benefit of the co-partnership.

The master found that St. Pierre took the goods for the purpose of withdrawing so much from the copartnership and sold them to Parsons with the intent of applying the avails to his own use; that Parsons bought the same because he believed he was making a good trade, and not with any intent of defrauding the orator, nor with any knowledge that St. Pierre proposed to appropriate the funds to his own use.

The various points raised by the orator's exceptions appear in the opinion.

A. D. Bates for the orator.

The question put defendant, St. Pierre, was a leading one. The orator's objection to that effect was overruled by the master, as a matter of law, and therefore the admission of the question and answer was legal error. *State v. Be-
dard*, 65 Vt. 278; *State v. Glynn*, 51 Vt. 577.

Dickerman & Young for the defendants.

The defendant, St. Pierre, was properly asked whether he intended to defraud the orator by a sale to Parsons. *Hu-
lett v. Hulett*, 37 Vt. 581; *McDaniels v. Robinson*, 26 Vt.
316; *Stearn v. Clifford*, 62 Vt. 92; *Ballard v. Burton*, 64
Vt. 387; *Stearns v. Goselin*, 58 Vt. 38.

ROWELL, J. The orator and the defendant, St. Pierre, were partners in the whip business, and their firm name was The Rock Island Whip Company. Before and at the time of the formation of their partnership, the orator had been and was carrying on the business under the same name. The co-partnership agreement between them provided that neither should draw any money from the partnership funds during the term, above his salary, except what might be "required for the payment of the debts of The Rock Island Whip Co." To show that the debts of the old company were thereby meant and not the debts of the new, the orator testified before the master without objection that said agreement was drawn by attorney Hackett, who said to him and St. Pierre when it was drawn, that said words, "The Rock Island Whip Co.," meant the old company and not the new.

To meet this, St. Pierre was asked on the stand, whether he ever heard a suggestion or claim made by the orator or Hackett, before or at the time said agreement was drawn, that said words meant the old company and not the new. The question was objected to as leading and incompetent; but the objection was overruled as matter of law, and the witness answered it in the negative.

As to the objection that the question was leading, it was properly so as far as it related to what the orator testified that Hackett said at the time the agreement was drawn, for it has long been quite the practice in this state, when a witness is called to contradict one who has said that such a thing was said or done, to ask leadingly whether the thing was said or done, although for one, I think the non-leading method is preferable even here.

As far as the question related to time antecedent to the time when the agreement was drawn, the answer could not have harmed the orator, for it was simply impossible for the witness to have heard either of those persons say anything about the meaning of those words as used in the agreement before it was drawn; and as far as it related to what the orator did or did not say at the time it was drawn, the answer could have done no harm, for the orator made no claim of having said anything at the time, and clearly, in the circumstances, no unfavorable inference could have been drawn against him from his silence. Nor was the question irrelevant in the part that went to the matter of the orator's testimony; and if irrelevant in the rest, the answer was harmless, as we have seen.

St. Pierre was further asked whether he heard the defendant, Parsons, say at a certain interview at which the orator and the defendants were present, that he had bought the whips in controversy and paid for them, but would return them if his money was refunded, "or that in substance." To this question the orator objected as leading and incompetent; but the objection was overruled as matter of law, and the witness answered, "I did." Before this, the orator denied on cross-examination that Parsons said any such thing at that time. The criticism of the question is now bestowed wholly on the words, "or that in substance," for that they left the witness free to put his own interpretation upon what Parsons said, without stating the substance of the language

he used. But we construe those words to refer to the language used by Parsons and not to its meaning, as if they had been, "or those words in substance." In this sense the question was perfectly proper; and if the orator thought in the time of it that the witness was undertaking to give the substance of what Parsons meant instead of the substance of what he said, he could easily have found out how it was by inquiry.

What is said of this question is an answer to a similar objection to the eighth question put to this witness, and also to the objections to questions fourteen and fifteen put to the witness Darling.

The orator claimed that the sale in question was fraudulent as to him on the part of both defendants, and so St. Pierre was asked whether it was *bona fide* or not, or whether he retained an interest in the whips after they were delivered to Parsons and paid for. The orator objected to the question, but did not state the ground of his objection, and the objection was overruled and the question answered. When objection to a question is such that it can be obviated, as this was, correct practice requires that the objection be stated, that the examiner may obviate it by reforming the question if he will. This rule is especially applicable to depositions; but it is a good general rule, and promotive of justice, for otherwise the objection would serve merely as a trap in which to catch the other party.

The complaint that the orator was improperly precluded from cross-examining the witness Norris concerning the prices he paid for thread in 1893 is not well founded, for before the master ruled that the witness need not answer, because his company had agreed with the firm of which it bought not to divulge the prices, he had answered that he could not tell, as he had no list present. This was a full answer to the question put, as far as the prices of thread were concerned; and as there was and is no suggestion that the

answer was not true, it seems reasonably clear that the orator could have gained nothing, in the circumstances, by further inquiry.

The sole ground of the bill for recovery against Parsons is, that he purchased the whips for the purpose of defrauding the orator; and as this is negated by the findings of the master, no decree can be had against him on the facts disclosed. Nor can there be a decree against St. Pierre as the case stands, both on the pleadings and the facts; for he must be charged, if at all, as partner, and the bill does not seek to charge him as such, and indeed does not seek to charge him at all, for in allegation and special prayer it seeks to charge Parsons only; and the facts found are no more to the purpose of charging St. Pierre than the bill is. It thus clearly appears that hitherto the orator has not designed to charge St. Pierre in this action, but only Parsons; but he now asks that the decree in favor of St. Pierre be reversed, that he may proceed against him for a settlement of their partnership affairs. But to proceed thus would necessitate an amendment of the bill that would make an entirely different case from what is now made by it. While the allowance of amendments of equity pleadings is matter of discretion, the exercise of which will depend largely on the special circumstances of the case, yet great caution should be used when the application comes, as here, after the litigation has continued a considerable time and reaches the court of last resort; and an amendment should rarely, if ever, be allowed when it would materially change the very substance of the case made by the bill and to which the parties have directed their proofs. *Hardy v. Boyd*, 113 U. S. 756. In *Lyon v. Talmadge*, 1 Johns. Ch. 184, it is said that the indulgence of amendment should not be carried to the extent of granting leave to make a new bill; that if the bill be found defective in prayer for relief, in want of parties, or in the omission or the mistake of a fact or circum-

stance connected with the substance of the case but not constituting the substance itself, an amendment is usually granted; but that the substance of the bill must contain ground for relief, and that there must be equity in the case when fully stated and correctly applied to the proper parties, sufficient to warrant a decree. See, also, *Hill v. Hill*, 53 Vt. 578.

This rule would preclude the orator from obtaining leave to make the necessary amendment if the decree against St. Pierre should be reversed for the purpose asked, and therefore a remand for that purpose would not avail him.

Decree affirmed and cause remanded.

ALFRED F. HUBBARD v. GEO. M. MOORE ET AL.

MAY TERM, 1895.

Partnership. Whether real estate is partnership assets. Conveyance of partnership property in fraud of partnership creditors. Evidence.

1. The question being whether certain real estate was to be treated as partnership assets, and so liable for an indebtedness of the defendant to the partnership, the finding of a master to whom is referred the winding up of the partnership is conclusive.
2. *Held*, that the evidence tended to show that the defendant, Milton G., knew soon after April 11, 1891, that the orator claimed that the conveyances from the defendant, Geo. M., to himself of that date were in fraud of the orator's rights.

3. A partner cannot convey partnership property in satisfaction of his individual debt, and one receiving such conveyance holds it subject to the rights of the partnership creditors; nor does he by paying off an incumbrance against such property after receiving the conveyance become a creditor of the partnership.
4. In determining the indebtedness of the firm the list of its liabilities contained in a tax inventory made up by one of the defendants, was properly admitted.
5. As bearing upon the question whether this real estate was partnership property, the fact that it was set in the grand list to the firm and that the firm paid taxes on it was admissible.
6. The question being whether the defendant, Geo. M., was indebted to the defendant, Milton G., at a certain time, the tax inventory of the latter covering that period, signed but not sworn to, was properly admitted.
7. *Held*, that under the circumstances of the case the orator might testify that he understood that the real estate was embraced in the written agreement of co-partnership.
8. The debts of the co-partnership being nearly as much as the value of the partnership property, a considerable part of which consisted of the real estate in question, a conveyance by the defendant partner of his entire interest in said real estate would be in fraud of the partnership creditors, and would justify a dissolution of the co-partnership and a decree for a sale of such real estate.

Bill for the dissolution and winding up of a co-partnership and the setting aside of certain conveyances of real estate as in fraud of partnership debts. Heard upon the pleadings and a master's report, and exceptions by the defendants thereto, at the December term, 1894, Windsor county. Ross, chancellor, overruled the exceptions of the defendants and decreed that the co-partnership be dissolved; that the real estate in question was partnership property; that the conveyance of the same by the defendant, Geo. M., to the defendant, Milton G., was void, and that the same to be annulled and the real estate sold regardless thereof. The defendants appeal.

From the master's report it appeared that in 1888 the orator was the owner of certain mills, water privileges, etc., and a considerable quantity of timber land, and was engaged in taking the timber from said land and manufacturing it into lumber, and that he also owned a store and quite an amount of personal property. The defendant, Geo. M., who was the nephew of the orator, entered into negotiations with the orator for a purchase of a one-half interest in all this various property and the formation of an equal partnership with the orator, for the carrying on of the business in which the orator was then engaged; and such an arrangement was finally concluded. By the terms of this agreement the defendant was to pay the orator the money for his interest in the property. In January, 1889, the orator conveyed in pursuance of the agreement, a one-half interest in all the property to Geo. M. Geo. M. could not pay as he agreed, but paid a certain amount in cash, gave his note to the orator for a certain other amount, securing the same by mortgage on the real estate, and the balance, about seven hundred dollars was charged to Geo. M. and credited to the orator upon the books of the company. This sum was never paid but had been increased to something over eight hundred dollars at the time of the bringing of this suit.

The orator and Geo. M. began business as partners as aforesaid in December, 1888, before the conveyance and continued as such to the date of the filing of the bill in this case. In March, 1889, they drew up and signed written articles in which they attempted to reduce to writing their previous partnership agreement.

The defendant, Geo. M., was the maker of a note for \$1200 on which the defendant, Milton G., his father, was surety. For the purpose of securing the said Milton G. against liability, upon said suretyship, on April 11, 1891, Geo. M. conveyed to him by deed absolute his entire interest in the aforesaid real estate. The orator did not learn of

this conveyance until some months afterwards, but as soon as he did he vigorously protested against the same and insisted that the real estate was held for the payment of the partnership debts notwithstanding said conveyance.

The partnership continued until November, 1893, when this bill was filed. The master found that the partnership debts April 11, 1891, amounted to some five thousand dollars and that the value of the partnership assets, including the real estate, was only about six thousand dollars, and that the amount of the debts continued about the same down to the commencement of this suit, although the orator had been obliged to take up and pay a portion of the same from his own means. The question litigated was whether the conveyance to Milton G. was void, as to the indebtedness of the partnership and as to the indebtedness of Geo. M. to the partnership. The defendants insisted that it was valid for the reason that the real estate was not a part of the partnership assets, but only the use thereof. The master found that it was the intention of the parties that it should be, and that the same was a part of the partnership assets.

The master found that the defendant, Milton G., knew, soon after the conveyance of April 11, 1891, that the orator claimed that these conveyances were in fraud of his rights. The first exception of the defendants was that there was no evidence tending to support this finding. Upon this point the master reported :

“This finding is based upon showing that he importuned his co-surety, Levi B. Moore, upon the Vilas E. Moore note, to share with him in the security afforded by said conveyances from his son, that the said Levi B. Moore flatly declined so to do, and assured the said Milton G. that there would be trouble about it ; upon the intimate relations existing between father and son. The communications from son to father mentioned on pages three and four of this report, and the knowledge of the father of the apparent way

in which the business was conducted. The inadequate explanation by both son and father of giving of the absolute deeds instead of a mortgage."

The other questions decided sufficiently appear in the opinion.

W. W. Stickney and *J. G. Sargent* for the orator.

A partner cannot convey partnership property in satisfaction of his individual debt. 3 Kent, 43; Pars., Part., s. 90 and note; *Washburn v. Bank*, 19 Vt. 278; *Miner v. Pierce*, 38 Vt. 610; *Dyer v. Clark*, 5 Met. 652; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310; *Mallack v. James*, 13 N. J. Eq. 126; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495.

The tax inventory was properly received to show the liabilities of the firm. *Flint v. Flint*, 6 Allen 34; *Kenerson v. Henery*, 101 Mass. 152.

Gilbert A. Davis, and *F. A. Walker* for the defendants.

No cause is shown for the dissolution prayed for. 1 Sto., Eq. Jur., s. 673.

As between the partners the real estate was not firm assets and creditors can only assert the equities of the partners. *Rice v. Barnard*, 20 Vt. 479; *Kimball v. Thompson*, 13 Met. 283; *Robb v. Mange*, 14 Gray 534; *Fitzpatrick v. Flannagan*, 106 U. S. 648.

TYLER, J. It appears by the master's report that on Dec. 1st, 1888, the negotiations for a co-partnership between the orator and the defendant, George M. Moore, were concluded by the latter's purchasing of the orator a one-half interest "in the mills, water privileges, timber lands, stock in the mills, equipment for carrying on the business and the stock in trade." The purchasing price was five thousand three hundred and ten dollars and eighty-three cents, of which one thousand five hundred and thirty-five dollars and

eighty-three cents was for the personal property, and three thousand seven hundred and seventy-five dollars for the real estate. While the negotiations were pending the two defendants examined a part of the lands in question with a view of such purchase when George M. could dispose of certain property. Two deeds from the orator to Geo. M., conveying an undivided half interest in the real estate, were executed Jan. 9, 1889, and a co-partnership agreement was executed Mar. 6, 1889. The business of the partnership actually began on Dec. 1, 1888, and by the agreement the partnership was to continue five years from that date.

One clause in the agreement was that the use of all the farm and timber lands, mills and machinery, should be delivered into the partnership business. The master finds that it was understood by the parties that all the property mentioned in the agreement was to be partnership property, and that the partners were to share equally in the profits and losses of the business.

The defendant, Geo. M., in fact paid the orator less than one-half of the agreed price. He gave him notes for two thousand one hundred and forty-five dollars and secured them by a mortgage of his interest in the five parcels of land conveyed in the second deed. About seven hundred dollars was charged to him and credited to the orator on the partnership books.

The defendants contend that the undivided half of the real estate so conveyed to Geo. M. was not partnership property, but only the use thereof. If this were an open question it would be apparent from the facts reported that the purpose of the conveyance was to make the entire real estate described partnership property. Story on Part. s. 93 says:

“Indeed, so far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty, and governed by the general doctrines of the latter. And so it will be deemed in equity

to all other intents and purposes, if the partners have, by their agreement, purposely impressed upon it the character of personalty."

But the master has decided this question as one of fact, and his decision is final if made upon proper evidence.

The first exception to the report cannot be sustained. What Geo. M. told his father about his purpose to go into business with the orator; the subsequent taking of the deeds by Geo. M. from the orator; the knowledge that Milton G. had of their contents, and of the manner in which the business was carried on; the refusal of Levi B. Moore to share in the security, saying there would be trouble, were circumstances that warranted the master in finding that the real estate was partnership property and that "either before or soon after April 11, 1891, Milton G. knew that the orator claimed that the conveyances from Geo. M. to himself were an attempt to defeat the orator's rights in respect to the real estate."

The second exception cannot avail the defendants. The fact that Milton G. paid off a part of the mortgage which Geo. M. gave the orator and which the latter had assigned to the savings bank, in consideration of the conveyance of Geo. M. to him, did not relieve him from the fraud in taking the conveyance, in view of the fact that Geo. M. was then indebted to the firm in the sum of eight hundred and eighty-five dollars and forty cents and that the debts of the firm were nearly equal to the value of the partnership property. This payment reduced Geo. M.'s indebtedness to the orator and improved the latter's security for the remaining note, but it did not make Milton G. a creditor of the firm. The purpose of the payment evidently was to benefit Geo. M., and so far as this payment is concerned it was a payment of Geo. M.'s individual debt in consequence of the latter having conveyed to Milton G. partnership prop-

erty. This transaction gave Milton G. no equity as against the partnership creditors or the orator.

Parsons on Partnership, s. 90, lays down the general rule that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time, or before existing, * * * the presumption of law is that the partner gives this and the creditor receives it in fraud of the partnership.

In the note to this section it is said that a partner has no authority to dispose of partnership property in payment of an individual debt, and that a creditor of the partner taking such property has no right to hold it as against the partnership, whether he claims absolute title, or holds the property by way of pledge or mortgage. Numerous cases are cited from the text and from the note in support of this rule.

It was not error to admit the list of debts and liabilities of the firm contained in the tax inventory of 1891. It was made by Geo. M. and was in the nature of an admission by him. To have considered the value of the firm's personal estate would have been error, for the value was fixed by the listers.

The fact that the real estate in controversy was set to the firm in certain years in the grand list of Plymouth, and that the firm paid the taxes thereon, was properly admitted as bearing upon the question whether it was or was not partnership property.

It was a controverted question whether or not Geo. M. was indebted to his father at the time of the formation of the partnership. Bearing upon this question the tax inventory of the latter for the year 1889, signed by him though not sworn to, was properly admitted.

One prayer in the bill is that the copartnership agreement may, if necessary, be reformed, so as to expressly declare—what the orator claims to be the fact—that the real estate was partnership property. Evidence seems to have been

admitted by the master, without objection, tending to show that negotiations were for some time carried on between the orator and Geo. M., relative to the formation of the partnership, in which it was agreed and understood that the "timber lands," with other enumerated property, were to go into the partnership. The defendants claimed that the written agreement did not bear this construction, and that by its terms only the use of the real estate went into the business. In this view it was competent for the orator to testify to his understanding whether the real estate was included in the written agreement or not. The evidence was admitted upon the ground that it tended to sustain the orator from the impeachment that resulted from his signing an agreement apparently different from the terms of the oral one to which he had testified, and it was competent for this purpose. If the written contract was open to construction on this point it was competent for the orator to testify to his understanding that the writing embodied the oral agreement.

The report states that an angry interview took place between the partners upon the orator's discovery of his partner's conveyance to Milton G., in which the orator insisted that the conveyance would be of no avail as against his rights under the partnership agreement. The business was continued until a short time before Nov. 23, 1893, the time of bringing this suit.

It is found that of the identical debts owed by the firm April 11, 1891, only one, and that of \$300, was outstanding when the suit was brought; that Nov. 1, 1893, the firm was owing between \$4,000 and \$5,000, including the Goddard note; that between Nov. 10 and Nov. 23, the orator retired out of his own funds about \$1,600 of these debts; that at the time of the hearing, May 8, 1894, the debts amounted to \$1,467.-85, but whether \$731.66 in the receiver's hands, realized from the sale of personal property, had been applied in liquidation of the debts, did not appear; that the books

showed the sum of \$2,323.60 due the orator from the firm, and that the sum of \$1,055.18 was due from Geo. M. to the firm. These sums, however, might be varied in certain contingencies. Neither the amount of the firm's debts nor the financial relation of each partner to the firm is definitely found.

It is found that the real estate was partnership property; that defendant, Geo. M., had no means whatever, besides his interest in the partnership property, with which to pay any of the firm's debts or his own debt due the firm; that in this financial condition he deeded to his father the entire interest in the partnership real estate which the orator had conveyed to him, as security for his father for signing a private note with him. In the circumstances the conveyance was such a fraud upon the orator as justified a dissolution of the partnership. It seems apparent from the report that the avails of sales of the personal property would not pay the orator's and other debts of the firm, though the value of the personal property is not definitely found. Therefore the decree in respect to the sale of the real estate was warranted. The sale of "the fifth parcel—the Colburn lot—" so far as the defendant, Geo. M., is concerned, would be of his equity of redemption therein, and would be subject to the mortgage executed by the orator and Milton G., March 14, 1892, if that is still a subsisting liability. What equitable right the defendant, Milton G., may have in the mortgage upon which he made the payment of Nov. 20, 1893, as against his co-defendant, we are not now called upon to decide.

Decree affirmed and cause remanded.

HARRY M. WALSTON

v.

ELIZABETH SMITH ET AL.

MAY TERM, 1895.

*Trust. Conveyance by trustee. Husband and wife.
Parol testimony. Evidence.*

1. A concession that a grantee in a deed of real estate and personal property "took no beneficial interest in the property thereby"; that "after the delivery of the deed the beneficial use and occupancy of the farm and personal property remained in the grantor the same as before," establishes the fact that the grantee is merely a passive trustee for the grantor.
2. A deed from such a trustee to one not a *bona fide* purchaser for a valuable consideration without notice conveys no greater estate than the trustee has.
3. But if the original grantor be the husband and the subsequent conveyance from the trustee is to the wife, and the latter conveyance is with the consent of the husband, then the law presumes that he intended that she should take a beneficial interest in the property, although no valuable consideration moved from her to the trustee; and this presumption should be weighed in determining whether she holds as a trustee or otherwise.
4. If the bill seeking to charge the wife as a trustee of such property for the benefit of the heir and creditors of the husband, alleges that the conveyance was made to her without the knowledge or assent of her husband, and she in her answer asserts that it was with his knowledge and assent, she is entitled upon a trial on the merits before a master, to have that allegation considered by the master as evidence in her favor.

5. *Held*, that the bill and answer did not put in issue whether the defendant was a purchaser for value, it being practically conceded that she was not, but did put in issue whether the conveyance was with the consent of the husband.
6. The property in question was conveyed by the husband to one admitted to be a passive trustee, and by him to the wife. *Held*, that it might be shown by parol whether the wife also took as a trustee.
7. The acts and declarations of the defendant would be admissible to establish a trust in her.

Bill to declare a trust. Heard upon the pleadings, master's report and exceptions thereto, at the December term, Addison county, 1894. THOMPSON, chancellor, *pro forma*, overruled the exceptions and dismissed the bill with costs. The orators appeal.

L. F. Wilbur and Stewart & Wilds for the orators.

When there is no consideration for a conveyance and the grantee takes no beneficial interest in the same, a trust results. 2 Sto., Eq., ss. 1197, 1198, 1201; 1 Perry, Trusts, s. 150 and cases cited.

The trust character of the transaction and property can be shown by parol and by the declaration of the trustee. 1 Perry, Trusts, ss. 76, 77, 147, 226; *Pinney v. Fellows*, 15 Vt. 525; *Clark v. Clark*, 43 Vt. 685; *Willard v. Willard*, 56 Pa. 119; *Dallinger's App.*, 71 Pa. 425; *Jenkins v. Eldridge*, 3 Story 183; *Boyd v. McLean and wife*, 1 Johns. Ch. 582.

Since her grantor held the property as trustee, the defendant took by her conveyance from him no other or different estate. *Zuver v. Lyons*, 40 Iowa 510; 1 Perry, Trusts, ss. 211, 217; *Stewart v. Chadwick*, 8 Iowa 464; *McLaren v. Brewer*, 51 Me. 405; *Oliver v. Pratt*, 3 How. (U. S.) 401; *Hall v. Van Ness*, 49 Pa. 457; *Hall v. Doran*, 13 Iowa, 368; *Bailey v. Winn*, 12 S. W. 1045 (Mo.); *Walson v. Murry*, 16 S. W. 293 (Ark.).

What was said between the defendant and her husband after she obtained the conveyance, could not change the character of her title. 1 Perry, Trusts, ss. 133, 135, 152; *Lusby v. Sinclair*, 24 Mich. 380; *Rogers v. Murry*, 3 Paige 390; *Barnard v. Jewett*, 97 Mass. 87.

In case of the conveyance of property from the husband to the wife without consideration, while the presumption is that a gift was intended, that presumption may be rebutted. *Wallace v. Bowen*, 28 Vt. 639; 2 Story, Eq., s. 1202; 1 Perry, Trusts, ss. 145, 147, 148, 151, 171; *Stevens v. Stevens*, 70 Me. 92; *Lane v. Lane*, 80 Me. 578; *Clark v. Clark*, 43 Vt. 685; *Peer v. Peer*, 3 Stoct. 432.

Roberts & Roberts and *Elihu B. Taft* for the defendants.

The trust sought to be established is a complicated one and ought not to be declared except upon satisfactory written testimony. *Pinnock v. Clough*, 16 Vt. 500; *Bottsford v. Burr*, 2 Johns. Ch. 405; *Williams v. Wager*, 64 Vt. 326.

Where the conveyance is to the wife, although no valuable consideration is paid, a trust does not arise by implication of law, for the law presumes that a gift was intended. *Bent v. Bent*, 44 Vt. 555; Sto., Eq., s. 1201 *et seq*; *Edgerly v. Edgerly*, 112 Mass. 175.

One may give away his property, unless it is done in fraud of his creditors. Perry, Trusts, ss. 161-165; *Salisbury v. Clarke*, 61 Vt. 453; *Dean v. Dean*, 6 Conn. 285; *Williams v. Wager*, 64 Vt. 326; *Philbrook v. Deland*, 29 Me. 410.

ROSS, C. J. This is a bill in chancery, brought to have a trust declared in regard to a farm and some personal property, formerly belonging to the intestate, Alfred Smith, by his heirs; the legal title to which is in the defendant, Elizabeth Smith, the widow of the intestate. August 24, 1889, the intestate conveyed the farm and property, by a warranty deed, containing the usual covenants and habendum, in the

absence, and without the knowledge of his wife, to a neighbor, S. R. Norton. The consideration expressed in the deed is thirty-five hundred dollars, but the master has found :

“There was no good and valuable consideration for the deed, and it was conceded by both parties, before me, that * * Norton took no beneficial interest in the property thereby, and I so find. After the delivery of the deed the beneficial use and occupancy of the farm and personal property remained in Alfred Smith, the same as before.”

How this concession came to be made by the defendants, the master has not informed us. It may have been because, as the solicitor of the orators claims, the defendants knew that the orators had abundant and competent proof to establish the facts conceded. The facts conceded establish that the grantee, named in the deed, took the legal title of the property and nothing beyond ; that he held the title not for his own use and benefit, but wholly for the use and benefit of the grantor, the intestate ; or, that he held the title to the property as a passive trustee for the intestate. It was not intended that Norton should take the management nor possession and control of the property conveyed. Norton holding the title to the property in trust, (except to a *bona fide* purchaser for a valuable consideration, without notice) could convey no greater nor better right to the property than he had. 2 Story's Eq. Jur., s. 1258. It is there said :

“The general proposition, which is maintained both at law and in equity upon this subject is, that if any property in its original state and form is conveyed with a trust in favor of the principal, no change of that state or form can divest it of such trust or give the agent or trustee conveying it, or those who represent him in right (not being *bona fide* purchasers for a valuable consideration without notice) any more valid claim in respect to it, than they respectively had before the change. An abuse of a trust can confer no rights on the party abusing it, or in those who claim in privity with him. 3 M. & Sel. 574, 576 ; 1 Peters R. 448 ; 3 Howard S. C. R. 333.

“This principle is fully recognized at law in all cases

where it is susceptible of being brought out as a ground of action, or defence, in a suit at law. In courts of equity it is adopted with a universality of application."

September 3, 1889, the trustee, Norton, conveyed the same property conveyed to him by the intestate, to the defendant, Elizabeth Smith. This conveyance was made at the request of Elizabeth Smith—by a warranty deed, with the usual covenants and habendum, for an expressed consideration of thirty-five hundred dollars. In her answer Elizabeth Smith does not claim that she was ignorant of the fact that Norton held the property in trust. The bill charges that Norton did hold it in trust for the intestate, and her answer does not deny it, and therefore concedes that Norton held the property in trust for the intestate, as found by the master. The bill charges that no consideration was paid by Norton to the intestate, and none paid by Elizabeth Smith to Norton. Her answer admits:

"That at the time * * these conveyances were made, no moneys, or other valuable considerations were advanced or paid to said Alfred, or to * * * Norton, as a consideration for such conveyance, except that she did, at the time of the conveyance by said Norton pay to him of the debt of said Alfred due to him the sum of one hundred and eighty two dollars and forty-seven cents."

This allegation falls short of a direct averment that this sum was paid by her to Norton as part consideration for his conveyance to her. The master finds that it was not a part of such consideration. Hence the defendant, Elizabeth, does not stand as a *bona fide purchaser*, for a valuable consideration without notice. The master further reports: "There was no evidence tending to show whether said Alfred did or did not, at the making of the deed, assent to the conveyance from said Norton to said Elizabeth, unless the bill in this cause contains such evidence." In regard to which he makes no finding. The defendant, Elizabeth, not being a *bona fide purchaser*, for a valuable

consideration, without notice, unless the assent of the intestate to the conveyance from Norton to her is shown, would take by the conveyance no greater rights than Norton had; that is, the rights of a passive trustee of the title of the property, the beneficial use of which remained in the intestate. The solicitor for the defendant, Elizabeth, urges that the court of chancery should have sustained her exceptions, one, two and four, to the master's report, and have found that she paid the one hundred and eighty-two dollars and forty-seven cents to Norton as a part consideration for his deed to her, and that she did not concede that Norton held the property as a passive trustee of the title only. If the answer can be held fairly to raise the question whether she paid Norton the one hundred and eighty-two dollars and forty-seven cents as part consideration for his conveyance to her, the recital in the deed did not conclude the orators from showing that the entire consideration for that conveyance moved from the intestate. *Pinney v. Fellows*, 15 Vt. 525. There was evidence before the master on this subject. The concession of the parties, both as to its scope and effect, was before the master in the place of proper evidence, to show whether Norton took by the conveyance from the intestate anything beyond the title of the property as a passive trustee for the intestate. Where there is legitimate evidence fairly tending to establish a fact, before the master, his findings thereon will not be disturbed by the court of chancery; neither will they be reviewed or revised unless fraud or corruption is shown. *Waterman v. Buck*, 58 Vt. 519; *Howard v. Scott*, 50 Vt. 48; *Merrill v. Railroad Co.*, 54 Vt. 200; *Randall v. Randall*, 55 Vt. 214. Hence these exceptions were properly overruled and the findings of the master stand for consideration. In regard to whether the bill raises the question, whether the intestate assented to the conveyance by Norton to the defendant, Elizabeth, it charges, in substance, that his consent thereto—if

he was capable of giving consent—was procured by the undue influence of the defendant; and that he was incapable and incompetent to give such consent. The answer denies these charges, and alleges that the conveyance was had upon his suggestion, upon his voluntary act, of his own free will, and sense of duty. We think the bill fairly raises the question, whether the intestate consented and that the allegations in her answer, on this subject, are responsive, and evidence in her behalf. The master has made no finding upon this evidence, and the defendant excepts to his report for this failure. His finding whether the intestate consented to the conveyance from Norton to the defendant, Elizabeth, may be essential. If he finds that the intestate did consent to this conveyance, it will raise a presumption, to be weighed by him, with the other testimony, bearing upon the character of that conveyance and the intention of the parties in respect thereto. Elizabeth was then the wife of the intestate. Although the property conveyed was the property of the intestate, so that he furnished the consideration for the conveyance, it being made to his wife, by his direction and consent, if nothing further was shown, the law would presume that he made it by way of an advancement for future support, from love and affection. This presumption could be rebutted by parol testimony, and considered with such testimony, the fact nevertheless could be established that she took the title as a passive trustee for the intestate, the same as Norton held it. *Wallace v. Bowen*, 28 Vt. 685; *Bent v. Bent*, 44 Vt. 553; *Clark v. Clark*, 43 Vt. 685; *Bennett v. Camp*, 54 Vt. 36. There was such parol testimony for consideration. Much of it consisted of the acts and declarations of the defendant, Elizabeth. The acts and declarations were properly received in evidence. *Pinney v. Fellows*, *supra*. If the master should find that the intestate consented to the conveyance from Norton to his wife, then this presumption would come into the case to be considered by him in connec-

tion with the parol evidence bearing upon the intention of the parties to that conveyance. This exception must be sustained.

The defendants further contend that the trust found by the master is so complicated that it should not be established except by evidence in writing, that the danger from the establishment of such a trust by parol evidence is too great. We cannot yield to this contention. If there is a legal basis for such an objection, the trust found is not a complicated one. It is no more than that she held the title to the property as a passive trustee for the beneficial use of the intestate, the same as Norton had done. From such a trust, all, or nearly all, found by the master, would legally result. If she should first de cease, the property would remain to the use of Alfred Smith, his creditors and heirs. If she should outlive him, it would still belong to his estate, to be used, and descend, mainly, if not fully, as particularized by the master.

Decree reversed pro forma and remanded with a mandate to recommit the report to the master for further findings, as set forth in the mandate.

SYDNEY H. SHERMAN

v.

ESTEY ORGAN COMPANY.

MAY TERM, 1895.

*One may be in fact principal, although signing as surety.
Chattel mortgage.*

1. The plaintiff claimed title through a chattel mortgage. The defendant insisted that the mortgage was void because the note secured was described as an absolute indebtedness, whereas, in fact, it was collateral for the payment of another note upon which the plaintiff was surety for the mortgagor. *Held*, that the evidence tended to show that the latter note was the debt of the plaintiff, although he signed the same as surety.
2. A mortgagee who takes possession of personal property under a chattel mortgage, valid between the parties, but invalid as to third persons, will hold it as against one who claims under bill of sale taken after notice in fact of the mortgage to secure an existing debt.

Trover for a quantity of lumber and wood. Plea, the general issue. Trial by jury at the March term, Windham county, 1895, ROWELL, J., presiding. The court directed a verdict for the defendant. The plaintiff excepts.

The plaintiff claimed title under a chattel mortgage of certain lumber and wood in Chesterfield, New Hampshire, given to secure a promissory note for two thousand five hundred dollars, signed by one Waite. It appeared that March

14, 1892, Waite desired to borrow two thousand five hundred dollars, and for that purpose applied to one Herrick, of Brattleboro; that Herrick was willing to loan the money, provided he could obtain proper security, and that a note was then executed to Herrick and signed by Waite and by the plaintiff as surety. The note secured by the mortgage was executed upon the same day, and the claim of the defendant was that the latter note was in reality held by the plaintiff as collateral security for his liability upon the note to Herrick, and that, therefore, the chattel mortgage which described the note secured by it as an absolute indebtedness, was void. The plaintiff claimed that the note to Herrick was, by virtue of an arrangement between the parties, his absolute debt, and that therefore the note described by the chattel mortgage was the absolute debt of Waite to himself, and that mortgage was valid.

The plaintiff's testimony tended to show that in June, 1892, he notified the defendant that he held the mortgage in question; that in December of that year he caused the mortgage to be foreclosed, bid off a large portion of the property himself and took possession of most of that which he bid off. The defendant claimed title under a bill of sale executed in July, 1892, by virtue of which it had taken possession of the property subsequently to the possession of the plaintiff.

Clark C. Fitts and L. M. Read for the plaintiff.

The mortgage was good as between the parties. Morrison's N. H. Digest, p. 105, s. 33; Pub. Stat. N. H., ch. 140, s. 12.

Haskins & Stoddard for the defendant.

The mortgage and oath described the liability secured as an absolute indebtedness, whereas in fact it was a collateral

liability. Under the decisions of New Hampshire, which must govern in case of this mortgage, the mortgage was void. *Parker v. Morrison*, 46 N. H. 280; *Belknap v. Wendell*, 31 N. H. 92; *Kennard v. Gray*, 58 N. H. 51; *Sumner v. Dalton*, 58 N. H. 295; *Page v. Ordway*, 40 N. H. 253; *State v. March*, 36 N. H. 196.

TAFT, J. The testimony disclosed by the record had a tendency to show that the note given to Herrick, signed by Waite and the plaintiff as surety, was the plaintiff's note to pay, notwithstanding the word surety was affixed to his name. The plaintiff testified that Herrick would advance the money provided he, the plaintiff, would "become responsible for it when due." "That he was to be responsible for this money to Herrick." Mr. Herrick deposed that he said "I wanted Sherman to understand thoroughly that I expected him to pay it the time it was due." Now while it is true that the plaintiff, if he signed the note as surety, would be responsible for its payment, the language used is susceptible of the construction that he was to be more than a mere surety—that he was to be the principal in the transaction. This testimony, taken in connection with the fact that a different arrangement was made between the plaintiff and Waite, than the usual one between them when the plaintiff signed a note with Waite as surety, viz.: That a note was given by Waite to the plaintiff for a like amount, and a mortgage given to secure it, had a tendency to show that the note held by Herrick was the note of the plaintiff to pay, and the note described in the condition of the chattel mortgage an absolute one, and not held as collateral. Under such circumstances the chattel mortgage was valid. The question should have been submitted to the jury.

The chattel mortgage, if null as to third parties, was valid as between the plaintiff and Waite. The defendant had notice of it, and after notice took a bill of sale of the mortgaged

property to secure, or in payment of, a precedent debt. If the plaintiff took possession of the mortgaged property he could hold it as against the defendant, even if the mortgage was invalid as to third parties. The testimony tended to show that he took possession of a part of it.

For this reason it was error to direct a verdict.

Judgment reversed and cause remanded.

ROSE A. MURRAY

v.

F. H. MATTISON ET AL.

MAY TERM, 1895.

Joint liability for trespass. Notice to produce. Proof of loss. Evidence.

1. The declaration contained two counts; one for assault upon the plaintiff, and the other for trespass to her goods. Two of the defendants justified as to the first count, and all as to the second. The jury, by special verdict, assessed damages on each count. *Held*, that a judgment for the entire damages against all the defendants was erroneous, for that it did not fairly appear from the exceptions that the jury had found all the defendants guilty under the first count.
2. Notice to produce must be given before the contents of a written instrument can be shown where there is a privity between the party to the suit and the one having custody of the writing. *Held*, that there was such privity between the plaintiff in a writ of possession and an officer sued for trespass committed in serving the same.

3. The question was whether the house from which the plaintiff had been evicted upon a writ of possession against her husband, had been rented to her or her husband by the owner Hall. *Held*, that letters from the housekeeper of Hall about the renting of the same were material and that the plaintiff must show their loss before she could prove their contents.
4. It appeared that the husband of the plaintiff had, for the most part, paid the rent by remittances sent by letter, directly to Hall, and had received receipts therefor, all of which the plaintiff well knew. *Held*, that a letter from the husband, enclosing a money order for rent and asking that certain repairs be made, was admissible.

Trespass. Plea, the general issue, with notice of special matter in justification. Trial by jury at the December term, Bennington county, 1893, Ross, C. J., presiding. The jury returned a special verdict upon which the court gave judgment against all defendants. The defendants except. The case appears in the opinion.

The letter of Nov. 19, 1888, referred to, was as follows :

"SOUTH SHAFTSBURY, VT., Nov. 19, 1888.

GILBERT HALL :

Dear Sir—Enclosed I send money order of eight dollars for rent of your house from Nov. 17 to Dec. 17. The house leaks badly, particularly the roof of the library room. I wish you would have some tinner repair at least that. The other leaks is no detriment to me, as I don't occupy the rooms in the attic. The flashing around the chimney is very defective. That is the cause of the leaks in the main roof.

Respectfully yours,

JOHN MURRAY."

W. B. Sheldon for the defendants.

Upon the special verdict there could be no judgment against the defendants jointly, and several judgments could not be rendered against them in this form of action. *Smith v. Kellogg et al.*, 46 Vt. 564; *Powell v. Thompson*, 80 Ala. 51; *Herron v. Hughes*, 25 Cal. 555; *Templeton v. Clogs-*

ton, 59 Vt. 628; *Barlow v. Leavitt*, 66 Mass. 483; *Fairfield v. Burt*, 28 Mass., 244; *Cunningham v. Dyer*, 2 T. B. Mon. (Ky.) 50; *Gearheart v. Smallwood*, 5 Mo. 452; *Grusing v. Shannon*, 2 Ill. App. 325; *Hundhausen v. Bond*, 36 Wis. 39; *Berry v. Fletcher*, 1 Dill. 67; *Chambers v. Upton*, 34 Fed. Rep. 473.

Batchelder & Barber for the plaintiff.

ROWELL, J. The declaration contains two counts. The first is for assaulting the plaintiff and expelling her from her dwelling-house; the second, for taking and carrying away her household goods. The defendants pleaded the general issue, and gave notice of justification under a writ of possession in favor of Hall against Murray, plaintiff's husband. The defendant Mattison, as deputy sheriff, and the defendant Hastings, as acting by his command and under his authority, justified the assault and expulsion complained of in the first count, and said Mattison and all the other defendants justified in like manner the trespass complained of in the second count. The exceptions state that the several defendants participated in the alleged trespasses as therein shown; that none of the other defendants did anything except under authority from Mattison; and that it was all one transaction. No general verdict was taken, but the court submitted several propositions for special findings. It appears from the charge, which is made a part of the exceptions, that there was really no controversy but that Mattison and Hastings alone, without the participation of the other defendants, put the plaintiff out of the house, nor but that all the defendants participated in carrying out the goods; and so the first proposition submitted for the jury to consider was, that on the day alleged the defendant Mattison, in serving said writ as such sheriff, and the defendant Hastings, acting under and by his command, forcibly removed the plaintiff from the premises described in the writ; and

the second proposition submitted was that all the defendants, acting in like capacity and by like authority, removed from the premises the household goods and the children of the plaintiff, against her will; and the jury found accordingly. The court submitted separate propositions on the question of damages, namely, one for a finding of damages for the expulsion of the plaintiff by Mattison and Hastings, and one for the damages for removing the goods and the children. In submitting the first proposition as to damages, the court told the jury that those damages related to Mattison and Hastings only, as the other defendants took no part in the removal of the plaintiff herself, and that the proposition was so drawn. The jury found that if the removal of the plaintiff by Mattison and Hastings was wrongful, she suffered thereby two hundred dollars damages, and that if the removal of her goods and children by all the defendants was wrongful, she suffered thereby fifty dollars damages, and that thirteen dollars of that sum were for damages unreasonably and unnecessarily done to the goods in such removal. The court rendered judgment for the plaintiff against all the defendants jointly for the full amount of the damages found and costs, to which the defendants excepted.

If, as the plaintiff argues, all the defendants went to the house for the common purpose of clearing it of whomever and whatever was in it, they are all equally and jointly liable, although all did not actually assist in putting the plaintiff out; for in that case the plaintiff had a right to treat the act of any of them as the act of all, and to sue all. But such was not the case, neither in the pleadings nor the proof. Mattison and Hastings gave notice of justification of the assault on the plaintiff; but the other defendants gave no such notice, but only notice of a justification of taking and carrying away the goods, and stood upon the general issue as to the assault upon the plaintiff; and the proof was, as the court told the jury, that they took no part in that as-

sault, and the findings are equivalent to a finding that they were not guilty thereof. This is unquestionably the way in which the exceptions present the case. It was, therefore, error to render judgment against all for the full amount, for thereby some of the defendants were made liable for damages not imputable to them.

If this was the only error in the case it would be necessary to consider against whom and for what amount the plaintiff can have judgment; but as there is other error that vitiates the entire findings, it is unnecessary to consider that question.

The principal question in the case was, whether the plaintiff or her husband was the tenant of the house at the time in question, and, as bearing on this question, whether she or her husband hired it of Hall. She claimed that she hired it herself in her own name and right before she moved in, and afterwards made a further contract with Hall for it.

To show that she hired it before she moved in, she relied upon certain letters that she wrote and procured to be written and sent to Hall and his housekeeper, respectively, and upon certain replies thereto from the housekeeper, written by Hall's authority, the contents of all which she offered to show by parol, without showing notice to Hall to produce those from her, or the loss of those from the housekeeper, which she was allowed to do. This was error. As to the letters to Hall, who lives in New York and is not a party of record, although it has been held that when an original paper is in the hands of a person who cannot be reached by the process of the court it is as much beyond a party's power to compel its production as though destroyed, and that therefore its contents can be proved by parol without notice to produce, yet this rule, if sound, does not apply if there is a privity between the other party and the custodian of the paper, for in such case the instrument is deemed to be virtually in such party's possession, and consequently notice to

produce is necessary in order to make secondary evidence of its contents admissible. 2 Phil. Ev. 521.

Hall was the party in interest in having the writ of possession executed, and in the circumstances the officer, the defendant Mattison, undoubtedly had a right to indemnity in respect of its execution. Cooley, Torts, 146; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 63. There was, therefore, such a privity between the officer and Hall that notice to produce was necessary.

As to the letters from the housekeeper, there is no doubt but proof of loss was necessary. Nor were these letters immaterial and therefore the admission of their contents harmless error, as now claimed by the plaintiff; but on the contrary, in the attendant circumstances, they undoubtedly had the tendency claimed for them by the plaintiff on trial.

The defendants claimed, and gave evidence tending to show, that Hall did not rent the house to the plaintiff but to her husband, and never recognized her as his tenant. It appeared that she personally paid none of the rent, but that her husband paid it from month to month to Nov. 1, 1889, by remittances direct to Hall, which Hall receipted in writing to Murray, and that the plaintiff was fully cognizant of all the correspondence that passed between them concerning it as the business went on. In view of this, the letter of Nov. 19, 1888, from Murray to Hall, offered in evidence by the defendants and excluded, was admissible against her as tending to show, in connection with the other testimony in the case, that she understood that her husband and not she was the tenant.

The defendants presented eighteen requests to charge, all of which, the record says, were refused. The defendants excepted to such refusal, and to the charge upon the subjects thereof. The defendants also alleged many specific exceptions to the charge. It were long to consider these

points one by one. Suffice it to say that we see no error in respect of any of them.

A few other questions have been argued, but they are of minor importance and are not discussed. We find no error concerning them.

Judgment reversed and cause remanded.

B. C. HOYT v. W. W. CATE.

LAMOILLE COUNTY, AUGUST TERM, 1893.

Settlement. Proposition not assented to cannot bind.

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1. A proposition for adjustment met by a counter proposition not assented to, does not bind the other party.
 2. *Held*, that there was no evidence tending to show such assent.

General assumpsit. Plea, the general issue, payment and offset. Trial by jury at the December term, 1892, Lamoille county, TAFT, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff presented an account of nine items and the defendant one of five, all of which accrued before December 24, 1890. The testimony showed that on that day the parties had made a jump settlement of their accounts, including these items. The plaintiff admitted that the terms of that settlement had been complied with, but insisted that he was entitled to recover on item two, nevertheless.

This item was, "Cash paid you to pay for oil, forty-eight dollars." It appeared that the plaintiff was owing two bills for oil, one for eight dollars and the other for forty dollars, and that he gave the defendant this money to pay these bills; that the defendant paid the smaller one, but did not pay the other, and that the plaintiff had been obliged to pay it.

The evidence of the plaintiff tended to show that the oil bills were not mentioned at the time of the settlement, but that soon after the following conversation passed between them in reference to them :

"Q. Anything else done between you?"

"A. Yes, sir. Before we left the depot Hoyt came to me and said: 'You ought to pay that telephone bill and oil bill,' and I says, 'I will if you pay for the lumber in the Stowe buildings; then I will pay the oil bill.'"

"Q. Was that after Mr. Keith had been called or before?"

"A. Afterwards."

"Q. In his presence?"

"A. No, sir; he was not present."

"Q. Did you pay the telephone bill?"

"A. I did, sir; thirty dollars."

"Q. What about the oil bill?"

"A. I paid the eight dollars and twenty-seven cents oil of the Tide Water Co."

"Q. Whether Mr. Hoyt has ever paid for the lumber?"

"A. No, sir; I never received a penny for it."

"Q. He says he agreed at something like thirty-five dollars and seventy-five cents for the lumber out there; is that true?"

"A. When I met him at Morrisville—I think at Mr. Churchill's store—he said they was crowding him about the oil bill and he thought I ought to pay it; and I told him I would if he would pay for the lumber in the Stowe buildings there."

The defendant claimed that this tended to show an arrangement that he was to pay the forty dollars on account of the oil bill only in case the plaintiff paid for the lumber, and asked that this question be submitted to the jury.

The court declined to so hold, and charged that if the plaintiff supposed at the time of the settlement that the defendant had paid the forty dollars he might recover it.

Geo. M. Powers for the defendant.

P. K. Glead for the plaintiff.

MUNSON, J. The plaintiff claimed to recover upon several items of charge. The defendant presented several items in offset, but claimed that both accounts had been wiped out by a sweeping settlement. The jury found the settlement as claimed by the defendant; but found under an instruction of the court that the plaintiff was entitled to recover one item of his account, notwithstanding the settlement. It is claimed that the charge was erroneous, in view of the testimony of the defendant set forth in the exceptions.

The defendant testified that soon after the settlement was made the plaintiff came to him and said, "You ought to pay that telephone bill and oil bill," and that witness replied that he would if the plaintiff would pay for certain lumber. As far as this was evidence tending to show that when the settlement was made the plaintiff knew that the money handed defendant to pay the oil bills had not been used for that purpose, and so was evidence calculated to leave the item recovered upon within the scope of the settlement, the defendant had the full benefit of it under the charge as given. But the defendant claims that it was also evidence tending to show that by a further arrangement this matter was so left that the defendant would be under no obligation to pay the plaintiff the amount of the unsatisfied oil bill, unless the plaintiff paid for the lumber; and that the question whether such an arrangement was made should have been submitted to the jury.

We think the testimony under consideration did not entitle the defendant to have this question submitted. The evidence

regarding the interview tended to show a proposition for a modification of the settlement just made, and a counter-proposition of terms upon which the proposed modification would be assented to, but no acceptance of this counter-proposition. It is true that no formal expression of assent is necessary, and that if there is evidence of anything from which an assent may properly be inferred, the question is to be submitted to the jury. But here we have absolutely nothing beyond the making of the counter proposition. There is no evidence that this was followed by a single word or sign. Nor is anything disclosed that could have a tendency to give an affirmative significance to the absence of expression. The narration brings the interview to a close with the counter-proposition unaccepted, and there is nothing to justify an inference in advance of what is stated.

Upon this state of the evidence regarding the interview, the mere fact that the defendant afterward paid one of the items embraced in the original proposition has no tendency to establish an agreement. It may be evidence tending to show that the defendant understood his counter-proposition was assented to, but is not evidence tending to show that it was assented to.

Judgment affirmed.

G. H. CARVER ET AL v. WILLIAM SPENCE.

MAY TERM, 1895.

Sale of real estate upon petition for partition. Inadequacy of price no ground for setting aside proceedings.

Where upon a petition for the partition of real estate the commissioners have, under order of the county court and upon due notice, sold the property, their report should be accepted and distribution of the funds received ordered, notwithstanding that the price was grossly inadequate.

Petition for the partition of real estate. Heard upon the report of commissioners at the September term, 1894, Rutland county, START, J., presiding. The court held as matter of law that the exceptions of the petitioners to the report presented no law question and ordered distribution of the fund. The petitioners except.

G. E. Lawrence for the petitioners.

J. C. Baker for the defendant.

The judgment and order of sale were conclusive. *Ward v. Mitchell*, 17 N. Y. 210; *Brooks v. Davey*, 109 N. Y. 495.

TYLER, J. The petitioners, who owned one undivided half of the real estate, made petition to the county court against the petitionee, who owned the other undivided half, that partition of the estate be made. Judgment was rendered that partition be made, and commissioners were ap-

pointed, who, upon an examination of the property, reported that partition could not be made without great inconvenience to the parties interested. Thereupon the court so adjudged, and ordered that the property be assigned to one of the parties upon payment by him of such sums of money to the other parties, and at such times and in such manner as the commissioners should adjudge equitable, and recommitted the report for that purpose. The commissioners again reported that none of the parties interested would take an assignment and pay the appraisal. Upon this report coming in the court directed the commissioners to sell the property at public auction. After due notice the commissioners sold the property at public auction to the petitioners for twelve thousand dollars, that being the highest bid therefor, upon terms that seven hundred dollars be paid at once and the remainder at a time fixed. They took the individual checks of the purchasers for one hundred and seventy-five dollars each, endorsed or guaranteed by all the others. They also took from them a written agreement that in case they failed to make said checks good, or to pay the balance of the purchase price of twelve thousand dollars, so much of the seven hundred dollars as should not be paid should be deducted from their share of the proceeds of a re-sale of the property, for the benefit of the petitionee. Two of the checks were paid; payment of the other two was refused; they were duly protested and due notice of non-payment was given. Payment of the remainder of the twelve thousand dollars was not made, and after sufficient delay the commissioners again advertised the property for sale at public auction and sold the same to one John L. Spence for one thousand dollars, which was the only bid therefor. The one thousand dollars was paid by the purchaser, and the commissioners executed and delivered to him a deed of the property pursuant to the rule of the court.

All the proceedings were in compliance with the require-

ments of the statute. It also appears that Mr. McCormick, attorney for the petitioners; Mr. Barden, one of the petitioners; Mr. Baker, attorney for the petitionee, and many others were present at the sale.

The price received was much less than the value of the property, but the commissioners were competent men, the sale was advertised four successive weeks in the Rutland Weekly Herald and four successive weeks daily in the Daily Herald and by posting notices of the sale in the town of Wallingford, where the property was situated, and in several other towns in the county, and personal notice of the sale was given to the attorneys of all the parties. It does not appear that the commissioners were requested to adjourn the sale, nor that any suggestion was made to them that a higher price might be obtained at a later time. No fraud is alleged, and the commissioners were warranted in giving title upon receipt of the price. If the court below had refused to accept the report, it could not have divested the title that had passed to the petitionee.

The exceptions present no question of law for revision. The court below properly directed payment of the costs and expenses from the proceeds of the sale, and a division of the remainder among the parties in accordance with their respective interests.

Judgment affirmed.

SCHOOL DISTRICT NO. 13 IN ST. JOHNSBURY

v.

IRA G. SMITH.

MAY TERM, 1895.

*School District. Warning for annual meeting. Officer
de facto. Treasurer.*

1. The warning for an annual school meeting must specify the business to be transacted, although fixed by statute, and the election of a treasurer at such meeting without an article in the warning therefor is void.
2. So long as an officer *de jure* is in possession of the office there can be no such thing as an officer *de facto*.
3. A school district cannot maintain an action against its legally acting treasurer for its funds in his hands.

Assumpsit. Plea, the general issue. Trial by court at the June term, 1894, Caledonia county, TYLER, J., presiding. Upon the facts found the court gave judgment for the plaintiff. The defendant excepts.

W. P. Stafford for the defendant.

Harry Blodgett for the plaintiff.

The warning need not specify the business, since the time of holding the meeting and the business to be done was fixed by statute. *Greenbanks v. Boutwell*, 43 Vt. 220;

Chandler v. Bradish, 23 Vt. 416; *Mason v. School District*, 20 Vt. 487; *Schaff v. Bloomfield*, 8 Vt. 472; *Warner v. Mower et al.*, 11 Vt. 385.

Huse was the treasurer *de facto*. *Thurston v. Est. of Holbrook*, 31 Vt., 354; *Danville v. Railroad*, 43 Vt. 153; *Mount Holly v. Bushwell*, 45 Vt. 361; *Richardson v. Railroad*, 44 Vt. 613; *Scott v. School District*, 67 Vt. 160.

ROWELL, J. If Huse was not legally elected treasurer of the district, the defendant's term of office as such treasurer had not expired when suit was brought, for by statute, his term continued until his successor was chosen.

The warning for the annual meeting of 1893, at which Huse was in form, at least, elected, contained no article for the election of officers except for the election of moderator. It is claimed that no such article was necessary, inasmuch as the statute requires annual school meetings to be held on the last Tuesday of March, and the election of officers at every such meeting. The statute requires that notices of school district meetings shall "specify the time and place of holding the same and the business to be transacted or questions to be considered" thereat, and makes no distinction in this regard between annual meetings and special meetings. As this is a matter governed wholly by statute, there is little room for discussion outside; but we are referred to several cases as authority for holding that no such article was necessary, but they are not such authority. We will mention two of them. In *Warner v. Mower*, 11 Vt. 385, the validity of an annual meeting of a private corporation was called in question, concerning which the court said that it is the law of such corporations that when the meeting is stated and general, no notice is required of the time and place of holding it nor of the business to be transacted. But this doctrine has no application to annual meetings of municipal corporations when the statute expressly provides how they shall be notified.

In *Schoff v. Bloomfield*, 8 Vt. 472, it was held, it is true, that a town at its annual March meeting, or at an adjourned term thereof, might transact business within the scope of its corporate interest whether the subject of the meeting was mentioned in the warning or not. But at that time the statute of 1797 was in force, which did not require that the business to be done and the subjects to be considered should be set forth in warnings for annual town meetings, but only in warnings for special town meetings, and it was not till 1839 that the requirement was extended to warnings for annual meetings; and the case was put expressly upon the ground of such non-requirement.

Huse was not, therefore, legally elected. But it is said that he was treasurer *de facto*. But the defendant was in actual possession of the office; and an officer *de jure* and an officer *de facto* cannot both be in possession of the same office at the same time. *Boardman v. Halliday*, 10 Paige, 223, 232; 5 Am. & Eng. Ency. of Law, 105.

The defendant being treasurer, his duties as such are declared by statute to be like those of town treasurers, and their duties are, by statute, among other things, to keep an account of moneys paid to them and paid out by them for the town; to pay orders drawn on them by certain other officers; to pay over to their successors the funds of the town in their hands when their office expires, if not re-elected, in default of which, for a month, they incur a penalty; and a balance due the town from them on going out of office, if not paid on demand to their successor, may be recovered in an action for money had and received.

Although the defendant is, in a sense, the agent of the district, yet he is its agent under, and according to, the statute, from which he derives his official authority, and by virtue of which he is the legal depository and custodian of the money as between him and the district for the uses and purposes therein named, and therefore the district cannot, in

this way, draw it from his hands, and besides, if it could, it would thereby, virtually, deprive him of his office, which it cannot do thus indirectly, any more than it could supersede its prudential committee, or control him in the performance of his statutory duty, which it certainly could not do, as has often been held.

Judgment reversed and judgment for the defendant.

FRANCIS FARRINGTON v. P. J. JENNISON.

MAY TERM, 1895.

Right to begin. Apportionment of costs. Application of payments. Rights of other party to testify when one party to cause of action dead.

1. If in an action upon a promisory note the defendant pleads the general issue, the plaintiff has the right to begin and close, although the execution of the note is not contested upon the trial.
2. When money is paid to apply upon a note the law applies it whether it is actually indorsed or not.
3. When the only issue upon trial is the amount due upon the note, the fact that the plaintiff recovered less than his claim does not entitle the defendant to an apportionment of costs.
4. The question being whether certain payments were made upon the note in suit to the original payee in his lifetime, the defendant cannot testify to conversations with the plaintiff touching such payments, although the plaintiff has been produced as a witness thereto.

5. The plaintiff was properly allowed to put in evidence an outlawed note, not in suit, from the defendant to the same payee with payments indorsed upon it, as tending to refute the claim of the defendant as to some of the payments upon the note in suit.
6. But this outlawed note was not the cause of action or contract in issue and on trial, being collateral thereto, and the defendant should have been allowed to testify to conversations with the plaintiff in respect to it.

Assumpsit. Plea, the general issue and offset. Trial by jury at the December term, 1894, Caledonia county, MUNSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff claimed to recover upon certain promissory notes given by the defendant to E. W. Farrington, or bearer, and transferred by the said E. W. to the plaintiff. The defendant filed a specification under his plea in off-set of certain sums which he claimed to have paid to the said E. W. Farrington in his lifetime, but which had not been endorsed upon the notes, and the only question litigated was as to whether these payments had been made.

Upon the trial the defendant conceded the execution of the notes and claimed the right to begin and close the argument to the jury. This the court denied, and the defendant excepted.

It appeared that E. W. Farrington had deceased before the trial. The plaintiff was improved as a witness to certain conversations had with the defendant in the lifetime of the said E. W. in reference to these payments, which the defendant claimed he had made upon the notes. The defendant thereupon offered himself as a witness in reference to these same conversations. The plaintiff objected that he was incompetent for the reason that the other party to the cause of action on trial was dead, and the court so ruled, and excluded the evidence under the exception of the defendant.

The plaintiff introduced a note from the defendant to the said E. W. Farrington, upon which were certain indorsements. The note was outlawed and was not in suit, but the plaintiff was allowed to show its execution and to put the note in evidence against the exception of the defendant upon the ground that the note and endorsements bore upon the claim of the defendant as to the payments which he pretended to have made. The plaintiff was improved as a witness in reference to certain conversations in the life time of E. W. Farrington in reference to this note and the payments made upon it. Thereupon, the defendant offered himself as a witness in reference to these conversations, but his testimony was excluded, upon the ground that the other party was dead, to which he excepted.

The jury found that the defendant had paid upon the notes some three hundred dollars more than the plaintiff admitted, and for this reason the defendant moved the court to apportion the costs. This motion the court denied, and the defendant excepted.

J. P. Lamson for the defendant.

The defendant should have been admitted as a witness to prove the payments made by him to E. W. Farrington. The estate was in no way a party or interested in the suit. *Manufacturers' Bank v. Schofield*, 39 Vt. 590; *Lytle v. Bond's Estate*, 40 Vt. 618; *Cole v. Shurtleff*, 41 Vt. 311; *Hollister v. Young*, 42 Vt. 403; *Morse v. Low*, 44 Vt. 561; *Downs v. Belden*, 46 Vt. 674; *Taylor v. Finly*, 48 Vt. 78; *Hall v. Hamblett*, 51 Vt. 589.

The defendant was entitled to have his costs apportioned. *Sumner v. Cummings*, 23 Vt. 427; *Hatch v. Hatch*, 60 Vt. 160; *Carlton v. Taylor*, 50 Vt. 220; R. L., s. 1451.

W. P. Stafford for the plaintiff.

The defendant was incompetent as a witness for the reason that the other party to the contract in issue was dead. *Insurance Co. v. Well*, 53 Vt. 14; R. L., s. 1002.

But one issue was tried, and upon that issue the plaintiff prevailed; therefore, there is no ground for an apportionment of costs. *Ross v. White*, 60 Vt. 558.

ROSS, C. J. The cause of action, in issue and on trial, was the mortgage notes, given by the defendant to E. W. Farrington, and by him transferred to the plaintiff. E. W. Farrington has now deceased. The defendant pleaded the general issue. This compelled the plaintiff to produce in evidence, and rely upon, his notes. This gave him the right to open and close the argument to the jury. The execution of these notes was not contested. The contention was in regard to whether certain sums claimed by the defendant to have been paid by him to E. W. Farrington, to be applied upon the notes in suit, had been so paid, and not endorsed by E. W. Farrington. The case does not disclose any item claimed by the defendant which would entitle him to recover under his plea in set-off. The items which the defendant claimed to have allowed him, were, on his evidence, payments on these notes. If made as payments, it was immaterial whether they had been endorsed as such. When the defendant established that he delivered any of the claimed items as payments on the notes, the law applied them, at once, in extinguishment of the notes *pro tanto*; and there was no burden on the plaintiff to show what had been done with the money. There was but a single issue tried—that was the amount due on the notes. The fact that the defendant succeeded in reducing the amount due to a less sum than claimed by the plaintiff, did not entitle the defendant to an apportionment of the costs. The defendant did not recover upon any issue in the case. R. L. 1002 provides:

“Where one of the original parties to the contract, or

cause of action, in issue and on trial, is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor except to meet or explain the testimony of living witnesses produced against him as to facts or circumstances taking place after the death or insanity of the other party."

This in terms supports the rulings of the county court in excluding the defendant from testifying as to all such matters and conversations in regard to the notes in suit, and in regard to payments thereon made in the life of E. W. Farrington, and while he owned the notes, although made or had with the plaintiff, and to which the plaintiff was a competent witness. As bearing collaterally upon some of the payments claimed by the defendant, and which the jury did not allow to him, as we understand the exceptions, the plaintiff was allowed to introduce another mortgage note, to show its execution, and conversations had by him with defendant about it. The only ground on which any of this evidence could be, or was, admitted, was that it had a tendency to explain and refute the defendant's testimony tending to establish his claimed payments. It is apparent it might have such a tendency, and therefore was properly admitted, although against the exception of the defendant. The court, against his exception, excluded the defendant from testifying in regard to a conversation which the plaintiff had been permitted to testify to, had with the defendant about this outlawed note. We think this was error. The outlawed note was not any part of the contract or cause of action on trial. It was claimed to bear, collaterally, upon that contract, or cause of action, as it tended to defeat one or more of the defendant's claimed payments thereon. R. L., 1002, is an exception to R. L., 1001, which removes the disqualification formerly existing to witnesses, arising from interest. The exception should not be given effect beyond the fair scope of its language. This confines the retained disqualification to testimony bearing directly upon the con-

tract, or cause of action, in issue and on trial. It does not extend to matters collateral to such contracts or cause of action. Such is the construction which this court has placed upon this provision of the statute. *Morse v. Shaw*, 44 Vt. 561; *Downs v. Belden*, 46 Vt. 674; *Taylor v. Finley*, 48 Vt. 78; *Banister v. Ovitt*, 64 Vt. 580. Under these decisions it was error to exclude the defendant from testifying in regard to his conversation with the plaintiff about the outlawed note.

Judgment reversed and cause remanded.

CHARLES McBURNEY ET AL. v. JAMES YOUNG.

MAY TERM, 1895.

What is meant by low water mark.

By "low water mark," as applied to the boundary of lands bordering on Lake Champlain, is meant *ordinary* low water mark.

Trespass to recover a penalty of ten dollars under No. 79, Acts of 1884, and damages. Heard at the September term, 1894, Franklin county, upon the report of a referee, ROWELL, J., presiding. Judgment in favor of the defendant, McCarty, without cost, and judgment *pro forma* against the defendant Young for a penalty of ten dollars and six cents damages and costs. The defendant Young excepts.

The plaintiff was the owner of marsh lands upon the border of Lake Champlain, and had posted notices upon such lands prohibiting shooting, trapping, or fishing on said lands, in accordance with No. 79, Acts of 1884. The defendant Young was camping upon the shores of Lake Champlain, and was at the time in question in a boat in company with McCarty for the purpose of shooting and fishing. McCarty was rowing the boat and the defendant Young shot at a flock of ducks flying over his head. The plaintiff claimed that the place where the boat was when the shot was fired was upon his land; while the defendant Young contended that it was upon the waters of Lake Champlain, and this was the question.

The referee reported that the water at that point was about eight inches deep at the time; that the bottom underneath the boat was a firm mud bottom; that the bottom at that point was at all times of the year covered with water to the depth of at least six or eight inches, in ordinary seasons, and that, therefore, it was below ordinary low water mark; that in the season of 1882, which was an exceptionally dry one, the water so far receded that the bottom of the lake at this point was uncovered, and that, therefore, the point was above low water mark in exceptionally dry seasons; that the plaintiff had sowed wild oats and wild rice in that vicinity, upon which fowls, both tame and wild, and the cattle pasturing upon the adjacent lands fed to some extent.

The referee found that the plaintiff was entitled to recover of the defendants, if anything, the penalty of ten dollars, and nominal damages, which he assessed at six cents.

Dillingham, Huse & Howland for the defendant Young.

Lake Champlain is a public water, and the title to the land below low water mark is in the public and is not subject to private ownership. Gould, s. 203; *Fletcher v.*

Phelps, 28 Vt. 262; *Austin v. Rutland Rd. Co.*, 45 Vt. 228, 242.

By "low water mark" is meant the ordinary low water mark. Am. and Eng. Enc. Law, 505 and cases cited; *Jones v. Parker*, 5 S. E. Rep. 384; *Seaman v. Smith*, 24 Ill. 524; *Delaplaine, v. G. and N. Ry. Co.*, 42 Wis. 225; *Sloan v. Biemiller*, 34 Ohio St. 513.

H. A. Burt and *D. G. Furman* for the plaintiff.

"Low water mark" means the lowest point to which the water recedes. *Wood v. Kelley*, 30 Me. 47; *Waterman v. Johnson*, 13 Pick. 265; *Dutton v. Strong*, 1 Black 30; *Stevens v. King*, 76 Me. 197.

THOMPSON, J. The plaintiff's land is bounded by the waters of Lake Champlain. Both parties concede that by the law of this state, the plaintiff's land does not extend beyond low water mark. Such is the law of this state. *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 316; *Austin v. Rutland R. R. Co.*, 45 Vt. 228. The contention is over the meaning of the term "low water mark" as used by the courts and law writers. The plaintiff insists that it means the lowest point to which the water has ever receded. The defendant says that it means *ordinary* low water mark.

By the common law, all that portion of land on tide-waters between high and low water mark, technically known as the shore, originally belonged to the crown, and was held in trust by the King for public uses, and was not subject to private uses without a special patent or grant. *Mayor of Mobile v. Slava*, 9 Porter (Ala.) 577; 33 Am. Dec. 325; *Pike v. Monroe*, 36 Me. 309; 58 Am. Dec. 751; 3 Kent's Com. (11th Ed.) *427. In Maine the common law was changed by an ordinance of 1641, which declares that proprietors of land adjacent to the tide-waters "shall have pro-

priety to the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." For the whole article see *Com. v. Alger*, 7 Cush. 67. In *Gerish v. Propr's of Union Wharf*, 26 Me. 384; 46 Am. Dec. 568, the court was called upon to define the meaning of low water mark as used in that ordinance, and in passing upon the question said :

"It evidently contemplates and refers to a mark which could be readily ascertained and established; and that, to which the tide on its ebb usually flows out, would be of that description. That place, to which the tide might ebb under an extraordinary combination of influences and of favoring winds, a few times during one generation, could not form such a boundary, as would enable the owner of flats to ascertain satisfactorily the extent to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain with ease and accuracy, whether they were encroaching upon private rights or not, by sinking a pier or placing a monument. It would seem to be reasonable, that high and low water marks should be ascertained by the same rule. The place to which tides ordinarily flow at high water, becomes thereby a well defined line or mark, which at all times can be ascertained without difficulty. If the title of the owner of the adjoining land were to be regarded as extending, without the aid of the ordinance, to the place to which the lowest neap tides flowed, there would be formed no certain mark or boundary by which its extent could be determined. The result would be the same, if his title were to be limited to the place, to which the highest spring tides might be found to flow. It is still necessary to ascertain his boundary at high water mark in all these places, where the tide ebbs and flows more than one hundred rods for the purpose of ascertaining the extent of his title toward low water mark. It is only by considering the ordinance as having reference to the ordinary high and low water marks, that a line of boundary at low water mark becomes known, which can be satisfactorily proved, and which having been once ascertained will remain permanently established."

Sir Mathew Hale in his treatise *De jure Maris*, c. 4, says

"the shore is that ground, that is between the ordinary high and low water mark." He remarks also :

"It is certain that, that which the sea overflows, either at high spring tides or at extraordinary low tides, comes not as to this purpose under the denomination of *littus maris*, and consequently the King's title is not of that large extent, but only to land that is usually overflowed at ordinary tides."

This treatise has been received by judicial tribunals and by distinguished jurists, both during the earlier and latter years of the law, with unqualified approbation and commendation. The authorship of this work has been questioned, but it has often been recognized in this country by the courts and has become a text book. Houck on Rivers, s. 30.

In *Storer v. Freeman*, 6 Mass. 435 ; 4 Am. Dec. 155, it was in effect held that low water mark as applied to the sea shore is ordinary low water mark.

In *Canal Coms. v. People*, 5 Wend. 423, cited in Gould on Waters, s. 82, Chancellor Walworth, while holding that the common law rule was applicable to the navigable fresh rivers of New York, said :

"The principle itself does not appear to be sufficiently broad to embrace our large fresh water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of tide or thread of stream, and our local law appears to have assigned the shores down to the *ordinary* low water mark to the riparian owners, and the beds of the lakes with the islands therein to the public."

In *Sloan v. Bienviller*, 34 Ohio St. 492, low water mark is defined to be "ordinary low water mark"; and in *Seaman v. Smith*, 24 Ill. 521, it is said to be the "line where water usually stands when unaffected by any disturbing cause." The question of what is meant by low water mark as a terminus of boundary was discussed and passed upon in *Stover v. Jack*, 60 Pa. St. 339 ; 100 Am. Dec. 566, and it was held to be the ordinary low water mark. While the opinion of the court disclaimed the application of any law

except that of Pennsylvania to the question, the reasoning of the court is very satisfactory. It said :

“To adopt any other rule than low water mark, unaffected by drought, as the limit of title, would carry the rights of riparian owners far beyond boundaries consistent with the interests and policy of the state, and would confer title where heretofore none has been supposed to exist. * * * Ordinary high water and ordinary low water each has its reasonably well defined marks, so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits. But to bound title by a mark which is set by an extraordinary flood, or an extreme drought, would do injustice, and contravene the common understanding of the people.”

These suggestions, as well as the others quoted, apply with great pertinency to the case at bar. Lake Champlain is a public, navigable water. It does not appear that, at any other time in its history, its waters have receded to the point to which they did, in the exceptionally dry season of 1882. We think that upon reason and authority, low water mark as a terminus of boundary, must be held to mean ordinary low water mark. This being so, defendant Young did not enter upon the premises of the plaintiffs, as the referee finds that Young's boat, from which he fired at the ducks passing overhead, at the time of such firing, was at a place in the lake below ordinary low water mark.

To dispose of the case, it is not necessary for us to determine what right, if any, the public has to sail over lands bordering Lake Champlain between ordinary high and ordinary low water marks, when such lands are covered with water, nor is it necessary to decide in respect to the right of the inhabitants of this state under Ch. 11, s. 40, of our state constitution, in seasonable times, “to hunt and fowl on the lands they hold and on other lands not inclosed,” nor in respect to the constitutionality of St. 1884, No. 79, and we do not consider either of these questions.

Judgment reversed as to defendant Young, and judgment that he recover his costs.

Tyler, J., being engaged in county court, and Start, J., having been of counsel, did not sit.

SHELDON & CUSHMAN

v.

TOWN OF BENNINGTON.

MAY TERM, 1895.

For what liabilities town may bind itself. Interest in suit.

1. The officers of a town cannot bind it for the expense of carrying on a suit in the event of which it has no direct interest.
2. A town has no such interest in a suit for divorce between husband and wife where the wife has lived for the last nine years with a daughter in Massachusetts and is still so living, although as a result of the suit the wife may possibly become chargeable to the town as a pauper.

Book account. Heard upon the report of an auditor, at the December term, 1894, Bennington county, ROWELL, J., presiding. Judgment for the plaintiffs. The defendant excepts.

C. H. Darling for the defendant.

The town had no power to bind itself by the employment of the plaintiffs, and therefore that contract was void. *Dill, Mun. Cor.*, s. 147, 447; *Taft v. Pittsford*, 28 Vt. 286; *Johnson v. Colburn*, 36 Vt. 693; *Minot v. West Roxbury*, 112 Mass. 1; 17 Am. Rep. 52; *Daniel v. Memphis*, 11 Hump. 582; *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. Rep. 485.

A contract cannot be made by a municipality to meet a liability until that liability exists. *Nashville v. Sutherland & Co.*, 92 Tenn., 335; 36 Am. St. Rep. 88; *Becker v. Keokuk Water Works*, 79 Ia., 419; 18 Am. St. Rep. 377; *Van Horn v. Des Moines*, 63 Ia. 447; 50 Am. Rep. 750; *Zottman v. San Francisco*, 20 Cal. 66; 81 Am. Dec. 96; *Bates v. Bassett*, 60 Vt. 536.

O. M. Barber for the plaintiffs.

The defendant was in danger of being compelled to support Mrs. Morse as a pauper, and was therefore interested in the event of the suit in which it employed the plaintiffs. *Van Sicklen et al. v. Burlington et al.*, 27 Vt. 70; R. L. s. 2751; *Willard v. Newburyport*, 12 Pick. 230; *Allen v. Taunton*, 19 Pick. 485; *Torrey v. Millbury*, 21 Pick. 64; *Spaulding v. Lowell*, 23 Pick. 71; *Hardy v. Waltham*, 3 Met. 163; *Bates v. Bassett*, 60 Vt. 535; *Bank of Columbia v. Patterson*, 7 Cranch 306; *Abbott's Dig. Law of Corp.*, 242, and cases cited.

ROSS, C. J. This is an action to recover for services rendered by the plaintiffs, as attorneys, in two suits between Lydia Morse and Luke Morse, one in favor of the former against the latter for support, reported in 65 Vt. 112; and the other in favor of the latter against the former for a divorce. The contention is whether the town had such an interest in the prosecution of the first, or in the defence of the

last suit, that it can be made liable for the services of the plaintiffs therein, if authorized by the officers of the town.

It is evident that towns can contract debts only for those purposes for which they can assess taxes. By R. L. 2751 :

“Towns in town meeting may vote such sums of money as they judge necessary for the support of the poor ; for laying out and repairing highways ; for the prosecution of the common rights and interests of the inhabitants, and for other necessary incidental town expenses.”

What expenses can be incurred “for the prosecution and defence of the common rights and interests of the inhabitants,” was considered in *Hazen v. Strong*, 2 Vt. 427, in which it is held that a town, when its inhabitants are exposed to the spread of the smallpox among them, may prevent such spread by procuring those exposed to be inoculated for the kine pox. In *Briggs v. Whipple*, 6 Vt. 95, it is held that a town may vote a tax to defend a suit in which it is pecuniarily interested, although not a party. The overseers of the poor of the town were sued by some third parties, for some property which the overseers had received of a pauper and turned over to the town. This was the suit which the town voted a tax to defend. The right of the town to hold this property would be determined by the suit. In *Van Sicklen v. Burlington*, 27 Vt. 70, the town owned valuable property which was exposed to be burned by fire. It was allowed to incur expenses for establishing and maintaining fire companies properly equipped for extinguishing fires, both for the protection of the property of the town and for the protection of the property of the inhabitants of the town. In each case the town and its inhabitants were directly interested in the object for which the expense was incurred. By implication they hold that a town cannot incur expenses in defence of suits in which the town or its inhabitants are not directly interested. This accords with the elementary text books on this subject. Says Mr. Dillon in his work on municipal corporations, s. 147 (98) :

“Where a municipal corporation *has no interest in the event of a suit*, or in the question involved in the case, and the judgment therein can in no way affect the corporate rights or corporate property, it cannot assume the defence of the suit, or appropriate its money to pay a judgment therein; and warrants or orders for the payment of money based upon such a consideration are void.”

As is tersely expressed in *Gregory v. City of Bridgeport*, 41 Conn. 76; 19 Am. R. 485, where a large number of cases are cited in support of it, “The want of interest involves the want of power.” *Merrill v. Plainfield*, 45 N. H. 126.

If, therefore, the suit to be prosecuted or defended cannot affect the corporate rights or interests of the municipality, under the circumstances then existing, the municipality has no power to assume its prosecution or defense. It is evident that its officers cannot bind a municipality to the payment for services to pay for which it could not legally assess taxes. From the facts reported, and those found in the case reported in 65 Vt. 112, it appears that Lydia Morse, when these services were performed, was the wife of Luke Morse; that they were married in 1855 and lived together until 1883; that she had then become blind and deaf, and had been cared for by her daughter; that the daughter, having married, was about to remove to Massachusetts and Mrs. Morse insisted upon going with her against the objection of her husband, who had always suitably supported her and was willing to continue to do so, at his home; that she insisted upon going; whereupon he paid the daughter two hundred and thirty-five dollars and allowed her to take the most of the household furniture, and thereafter did nothing further for the support of his wife. At this time they were living in Bennington. When the suit was brought he was living in Bennington and his wife in Massachusetts, and they had been so living about nine years. At various times, the daughter had written the town authorities that unless they did something for the moth-

er's support she should bring her back and throw her upon the town. She wrote the overseer of the defendant such a letter in 1892. The husband then had a petition pending for a divorce. The plaintiffs, under the direction of some of the town officers, brought a petition in favor of Lydia Morse, under Act 33 of 1890, to compel the husband to support her. In this suit, under the law, whatever orders the court might lawfully make on the husband in favor of the petitioner in regard to her support, could in no event inure directly to the control or benefit of the town; nor could any such order for alimony, in her favor, in the divorce suit. Lydia Morse had then, for about nine years, not been a resident nor inhabitant of the town of Bennington, but, during all that time, had resided in Massachusetts, where the town had and could have no control over her. The auditor has found that at the time these services were commenced, Lydia Morse was likely to become a public charge, either in Massachusetts or in defendant town, unless the husband, who resided in the defendant town, volunteered or could legally be compelled to support her; also, that defendant was then in jeopardy of having to support her. Both suits resulted in favor of the husband. Lydia Morse did not become a public charge upon the defendant. The contention is whether on these facts the defendant can be holden to pay for the plaintiffs' services. We think it can not. Mrs. Morse was not a public charge upon the defendant at the time they were performed. The town had and could have no control over her movements or support. No order or judgment in either suit could be rendered which would be directly for the interest of the town. The town then had no interest in Mrs. Morse, and owed her no duty which it needed to protect or discharge. It could have no such duty nor interest until she became its pauper—until it was charged with her support, and she was subject to its control. The possible contingency that might,

or might not, thereafter arise which would make it interested in her support, is too remote. The interest, to authorize expenditure at the expense of the taxpayers, must be immediate and direct. To hold that it might incur expenditure on such a contingency, would open the door too wide, and the taxpayers would never know for what legal expenditures they might be made liable. There is a possibility that any living non-resident person may become, at some time, in the near or more remote future, a resident pauper in a town. This possibility is more nearly probable in regard to some such non-residents than in regard to others. It does not appear that Mrs. Morse's last residence for three years was in the defendant town, nor that the daughter could bring her there, and throw her upon the town as a pauper, without incurring the penalty imposed by statute for bringing paupers into the state. She, therefore, on the facts found, stood in regard to becoming a pauper at the charge of the defendant like any other non-resident poor person, whom some one, at his peril, threatens to bring into the town. What might be the right of the town to take action against the person making the threat is not considered. In the case at bar, the officers and plaintiffs assumed that the daughter would carry her illegal threat into execution; that the town would be charged with Mrs. Morse's support, and undertook to forfend itself against such assumption by procuring, at the expense of the town, Mrs. Morse's support to be charged upon her husband, not in the name nor control of the town, but in her name, at her control. This it could not incur expenditure for.

Judgment reversed and judgment for the defendant to recover its costs.

CHARLES B. BALLARD v. W. C. BROWN.

MAY TERM, 1895.

Trotting for purse not unlawful. Exception not considered.

1. Trotting for a purse or stake is not trotting for a wager within R. L., s. 4305, as amended by No. 156, Acts of 1888, nor is it playing at a game within R. L., s. 4308.
2. An exception to the action of the trial court in excluding a letter will not be considered in supreme court, where the letter is not before that court nor its contents stated.

Assumpsit. Plea, the general issue. Trial by court at the December term, 1894, Windsor county, Ross, C. J., presiding. Upon the facts found the court gave judgment for the plaintiff. The defendant excepts.

F. W. Baldwin for the defendant.

Taylor was the plaintiff's agent, hence the letter written by him to defendant was admissible. *Weeks v. Barron*, 38 Vt. 420; *Baldwin v. Doubleday*, 59 Vt. 7; *Commonwealth v. Keyes*, 11 Gray 323; *Connecticut v. Bradish*, 14 Mass. 296.

The contract was against public policy, and void. *Talman v. Shader*, 23 Ill. 493; *Woodruff v. Hinman*, 11 Vt. 592; *Danforth v. Evans*, 16 Vt. 538; *Collamer v. Day*, 2 Vt. 144; *Elkins v. Parkhurst*, 17 Vt. 105; *Tarleton v. Baker*, 18 Vt. 9; *West v. Holmes*, 26 Vt. 531; *Comly v. Hillegrass*, 94 Pa. 132; 39 Am. Rep. 774; *Breeders*

Ass'n v. Ramsdell, 24 Mich. 441; *Ellis v. Beale*, 18 Me. 337; *Shropshire v. Glasscock*, 4 Mo. 536; *Mosher v. Griffin*, 51 Ill. 184; *Mount & Wardell v. Waite*, 7 Johns. 434; *Wilkinson v. Touseley*, 16 Minn. 299.

W. E. Johnson and William Batchelder for the plaintiff.

Error cannot be predicated on the exclusion of a letter whose contents are not shown. *Ainsworth v. Hutchins*, 52 Vt. 554.

Trotting for a premium is not a wager, and is not prohibited by statute. R. L., s. 4305; Acts of 1888, No. 156.

ROWELL, J. The letter from Taylor to the defendant, offered in evidence and excluded, is not before us nor its contents stated. We cannot, therefore, say whether it was admissible or not, even though authorized by the plaintiff, which does not appear and was not offered to be shown. *Ainsworth v. Hutchins*, 52 Vt. 554.

In the fall of 1889, plaintiff and defendant agreed that plaintiff's horse should trot in a race then soon to be had at a fair in Barton, and win it, and that defendant should pay him therefor one hundred dollars and keep him and his horse and driver. The race was for a purse offered by the Orleans Fair Ground Co., an organization chartered under the laws of the state. The horse trotted in the open-to-all race and won it; but none of the purse for which the race was trotted was to go to the plaintiff, and none of it did go to him.

The parties further agreed that if the plaintiff would procure other horses to trot in the races, defendant would pay him therefor such further sum as they should agree upon. Plaintiff procured another horse to trot in the races, for which they agreed that defendant should pay him eight dollars. The races were trotted under the auspices of said company, of which the defendant was treasurer, and both

horses won purses that were not paid. The horses were entered by Taylor, who had authority to enter plaintiff's horse in races and to drive it therein.

It is claimed that plaintiff cannot recover, for that the transaction in which he engaged was a wager, and therefore within R. L. 4305, as amended by No. 156, Acts of 1888, which imposes a penalty for trotting or racing a horse for a wager of anything of value, and for causing or aiding in causing such a trot or race; and for that it was a play or hazard at a game or a betting on such play or hazard, and therefore within R. L. 4308, which provides that a person who wins or loses money or other valuable things by play or hazard at any game, or by betting on such play or hazard, shall incur a penalty. Section 4305, before it was amended, prohibited trotting and racing, not only for a wager of anything of value, but also for "a purse or stake," and the amendment consisted in leaving out the words, "a purse or stake." This indicates that the legislature thought that trotting for a wager and trotting for a purse or stake were different things, for it can scarcely be supposed that the amendment was made merely for brevity's sake, and that the purpose was to take the latter out of the statute and retain the former in it. Subsequently, in 1892, for greater certainty in regard to trotting for a purse or stake, it would seem, as no other purpose is obvious, the legislature enacted that agricultural societies, corporations, and associations, authorized under the laws of the state to hold public fairs for the competition of horses in respect to speed, may offer premiums or purses for success in such competition.

Thus it has become the settled policy of the state to allow the offer and payment of purses and premiums for success in the competition of horses as to speed, a policy very different from that which prevailed in 1823, when section 4305 was first passed, as will be seen by reading that act, which condemned the practice very severely, visited it with heavy

penalties and forfeitures, and enjoined its strict enforcement. But in later years a great interest has been awakened in the matter of improving the products of the herds, the flocks, and the field, the great promoters of which are the agricultural societies, the horse breeders' associations, and kindred organizations of the day, which have come to be fixed institutions among us, and are approved of, fostered and sustained by the people generally, and looked upon as necessary for the best good of the interests they are designed to promote, and our legislation has conformed the law to this changed public sentiment by permitting, as aforesaid, the offer and payment of premiums and purses for success in the competition of horses as to speed, which stands in the same category as like offers and payments for success in the competition of horses as to walking or driving, and in the competition of oxen as to strength, and the like.

We quite agree with the legislature that trotting for a wager and trotting for a purse or stake are different things. A wager, as the term is used in the statute, is a bet, which is a pledge, as of money, to be paid to another in a certain event, the other pledging to pay a forfeit in the contrary event. This is practically the definition this court gave of wager in *Edson v. Pawlet*, 22 Vt. 291. It is obvious that trotting for a purse or stake is not a transaction of that kind but, as was said of the case cited, more properly belongs to the class of "no cure no pay cases."

Nor is trotting for a purse or premium a game within the meaning of section 4308. That section was originally passed in 1787, and was part of an act that prohibited, among other things, tavern-keepers, etc., from keeping in or about their houses and premises any cards, dice, bowls, shuffleboards or billiards, or any instrument for gaming, and from suffering persons resorting to their houses to use or exercise any of said instruments for money, goods or liquor, and also prohibited persons from playing at any such games

on any bet or wager, and from betting or wagering money or goods on any horse racing or other sport. This portion of that statute was kept together till the revision of 1839, when the matter of betting on horse racing was disconnected and placed elsewhere, and the substance of the rest of it was embodied in sections 10 and 11, chapter 101, of that revision, which have come down as sections 4307 and 4308 of the Revised Laws. Said section 11 of the revision retained, after the words, "play or hazard," the words, "at cards," etc., and had the further words, "or any other game or games whatever," as a substitute for all which, section 4308 has the words, "at any game," which do not enlarge the former scope of the statute in this regard, and embrace no game that was not before embraced within it, of which, it is clear from this review, that trotting for a purse was not one, but was a separate and distinct thing under the statute.

This being a matter of construction, reference to the cases cited from other states in which it is held that such trotting is a game within their statutes, would afford us little aid, because of the difference between their statutes and ours in history, enactment and wording.

Hence the races in which plaintiff's horses participated were not unlawful, nor the contract he made wagering.

Judgment affirmed.

H. WALTER v. W. T. FOSS.

MAY TERM, 1895.

Audita querela. Will not lie unless judgment obtained by fraud.

1. In general *audita querela* will not lie unless the judgment sought to be vacated was obtained by the fraud or misconduct of the other party.
2. Where, owing to a misunderstanding between the agent of the defendant and the plaintiff's attorney, but without any fraud upon the part of the attorney, the defendant failed to enter an appearance, *audita querela* will not lie.

Audita querela. Trial by court at the December term, 1894, Caledonia county, MUNSON, J., presiding. Upon the facts found the court gave judgment for the defendant. The plaintiff excepts.

Plaintiff *pro se*.

The plaintiff lost his day in court through the fault of the defendant's attorney and is entitled to the relief prayed for. *Weeks v. Lawrence*, 1 Vt. 433; *Folsom v. Connor*, 49 Vt. 4; *Tyler v. Lathrop*, 5 Vt. 170.

Bates & May for the defendant.

Fraud must be shown in the defendant. The plaintiff cannot find relief in this form of action from the results of his own remissness. *Little v. Cook*, 1 Aik. 363; *Scott v. Dar-*

ling, 66 Vt. 510; *Tyler v. Lathrop*, 5 Vt. 170; *Stamford v. Barry*, 1 Aiken 321; *Foster v. Stearns*, 3 Vt. 322; *Barrett v. Vaughn*, 6 Vt. 243; *Betty v. Brown*, 16 Vt. 669; *Sutton v. Tyrrell*, 10 Vt. 87.

TYLER, J. In a suit before a justice of the peace, by the plaintiff against the defendant, the latter recovered a judgment on his declaration in offset. The files of the justice being lost, the amount of the judgment is in dispute.

Foss afterwards brought a suit upon his judgment and recovered another judgment thereon, from which Walter took an appeal and entered it in county court.

Walter had employed one Allard, a person not a lawyer, to assist him in his suits, and at the opening of the term when the appeal was to be entered, employed him to go to St. Johnsbury to do whatever was necessary to protect his interests in the suit, including the employment of counsel. Allard there had an interview with Mr. May, who was an attorney for Foss.

All that was said in the interview does not appear, but May told Allard that it was not necessary for him to employ an attorney; that it was a small case and the defendant might appear *pro se*. Allard understood that May would have the entry made. May did not in fact agree to have it made and did not suppose that Allard so understood the matter. May practiced no fraud upon Allard and did not suppose that the latter understood that he was relieved from further responsibility in the case. On account of this conversation and his ignorance of the rules of court, Allard supposed the case would be continued, and so informed Walter, who took no further action about it, and judgment was entered therein against him.

The peculiar office of *audita querela* is to vacate a judgment that has been procured by the fraud or other misconduct of the opposite party. It is not available where the injury of

which the plaintiff complains is attributable to his own neglect, nor to correct an error of the court in rendering the judgment. As was said by Hutchinson, J., in *Little v. Cook*, 1 Aik. 363, it is a writ in which the plaintiff sounds in tort. See Rob. Dig., title *Audita Querela*, and same title in 1 Am. and Eng. Enc. of Law where the uses of the writ are quite fully discussed. Therefore, to maintain this action some act of the defendant or his attorney must be alleged and proved by which the judgment was wrongfully procured. The decision of the court below acquits the defendant's attorney of any wrongdoing in the matter; on the contrary, he seems to have pointed out to Allard, in a friendly spirit, a way in which he might secure a continuance of the case with little expense. That Allard did not see the way was not the fault of the attorney. The action does not lie.

Judgment affirmed.

GEORGE RANNEY, ADMR. OF RUTH RICHARDS,

v.

ST. JOHNSBURY & L. C. RD. CO.

CALEDONIA COUNTY, MAY TERM, 1893.

Negligence. Railroad company. Evidence. Overruling motion pro forma.

1. The action being for the alleged negligence of the defendant resulting in the death of the plaintiff's intestate, it is not error to allow the physician who attended the intestate to testify that he has received no compensation for his services from any source, nothing further appearing.
2. It is within the discretion of the trial court to permit the plaintiff to bring out, upon the cross-examination of the defendant's witness, matters which, in the then state of the case, could be properly shown in rebuttal.
3. Where a ruling is within the discretion of the trial court, it will be presumed to have been made as a matter of discretion, unless the contrary affirmatively appears.
4. If a question asked upon re-examination is not in explanation or avoidance of anything brought out in cross-examination, the trial court may in its discretion exclude it.
5. The train bearing the intestate arrived from the east. Passengers from that train alighted upon a platform about six feet wide, and from thence passed across another track of the defendant to the station platform. Just as the passengers upon this train were alighting, another train of the defendant from the west drew in upon the track between the narrow platform and the station platform, and the intestate was in some unexplained way drawn under the wheels of the latter train. There was an unusual crowd upon the

platforms that morning, and the trains did not arrive upon schedule time. *Held*, that evidence that other railroads at certain specified points employed a similar arrangement of tracks and discharged passengers in the same way, was properly excluded.

6. One question being whether the intestate voluntarily incurred the danger from which she suffered, while under the reasonable apprehension of a real or apparent peril, evidence that just before her own accident another person in attempting to cross from the narrow platform to the station had narrowly escaped being run over by the same train which injured her, and that the episode had been attended with considerable noise and confusion, is admissible.
7. Where a motion is addressed to the discretion of the county court, it is reversible error to overrule it *pro forma*, for the party making it is entitled to have the court exercise its discretion. So held of a motion to set aside a verdict for that the damages were excessive.

Case for the negligence of the defendant. Trial by jury at the December term, 1892, Caledonia county, Ross, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

The plaintiff brought suit as the administrator of one Ruth Richards for the alleged negligence of the defendant in the operation of its railroad resulting in the death of his intestate.

It appeared that the defendant's railroad running east and west connected at St. Johnsbury with the Connecticut & Passumpsic Rivers railroad, running north and south, and that by an arrangement between the two companies the defendant was then using the station platform and tracks of the Connecticut & Passumpsic Rivers railroad at that point for its passenger traffic. In front of the station was a wide platform extending the whole length of the same, and next to this was the main line of the Passumpsic railroad. Directly across this track and to the east of the station platform was a narrow platform about eight inches above the top of the rail, seven and one-half feet wide and extending about one hundred and twenty feet north and south. Directly east of this

platform was still another track. The cars upon these tracks projected over the narrow platform upon either side from two to four inches.

At the time of the accident the mail train on the Passumpsic railroad from the north was due at St. Johnsbury at 9:06 A. M., the mail train on the defendant's railroad from the east at 9:08 A. M., while a mixed train upon the defendant's railroad from the west was due at 8:55 A. M. Ordinarily the defendant's mail train from the east drew in upon the track east of the narrow platform and discharged its passengers upon that platform; while the mail train upon the Passumpsic road drew in upon the main line beside the station platform.

Upon the morning of the accident the intestate came to St. Johnsbury on the defendant's mail train from the east, intending to take the Passumpsic mail toward the south. Both the Passumpsic mail and the defendant's mixed train were behind time. When her train arrived it drew up upon the east side of the narrow platform and discharged its passengers upon that platform as usual. Owing to some gathering in St. Johnsbury at that time, both the platforms around the station and the trains arriving were unusually crowded.

Upon the arrival of the defendant's train from the east, the intestate alighted with her daughter upon the narrow platform with the other passengers and passed toward the north end for the purpose of crossing over to the station platform at that point. Just at this time the defendant's mixed train from the east arrived and drew in upon the main line between the narrow platform and the station platform, and the intestate in some manner not explained, was pushed, or fell, under the moving cars, and received the injuries from which she subsequently died.

The plaintiff claimed that the defendant was negligent in operating its trains in the manner it did on that morning by drawing in its train from the west on the main line while so many persons stood on the narrow platform, and in allowing

the passengers to disembark upon the narrow platform without notice to remain in the cars and in not taking proper measures to notify persons upon the narrow platform of the approach of the mixed train.

The plaintiff offered the testimony of Cephas Hill to the effect that he arrived on the same train with the intestate and alighted from a car at about the same time she did and attempted to pass over from the narrow platform to the station platform; that just as he was about to step onto the station platform he became conscious that an engine was near him and that he was dragged from the track onto the platform, and that the engine just brushed him as it passed; that this was the engine on the defendant's mixed train, being the same train by which the intestate was killed. The defendant objected to the introduction of this testimony for that it was immaterial, and excepted to its admission.

The defendant moved to set aside the verdict for that the damages were excessive. The court *pro forma* overruled this motion, to which the defendant excepted.

The other points raised by the exceptions and passed upon by the court sufficiently appear in the opinion.

S. C. Shurtleff and *C. A. Prouty* for the defendant.

The evidence of Cephas Hill was improperly admitted. What happened to him was entirely collateral and had no tendency to support any issue in the case. 1 Green. Ev., ss. 52, 448; 1 Best, Ev., p. 475, s. 225; *Blanchard v. Putnam*, 8 Wall. 420; *Hathaway v. Tinkham*, 148 Mass. 85.

Testimony tending to show that other railroads at other points continually operated their trains in the manner claimed to have been negligence upon this occasion, should have been admitted. The question was whether the defendant acted with reasonable prudence, and certainly the common practice of other companies had some bearing upon this issue. 1

Shear. & Red., Neg., ss. 11, 12; *Calkins v. City of Hartford*, 33 Conn. 57; *Darling v. Westmoreland*, 52 N. H. 401; *Bradley v. B. & M. Rd. Co.*, 2 Cush. 539; *Shaw v. B. & W. Rd. Co.*, 8 Gray 45.

The court should have considered the defendant's motion to set aside the verdict, and the exception by the defendant raises this question. *Farrant v. Bates*, 60 Vt. 37.

W. P. Stafford for the plaintiff.

The testimony of Cephas Hill was properly admitted. It was in the nature of an experiment which enabled the jury to understand the condition of things at that point. *Kent v. Lincoln*, 32 Vt. 591, 597; *Walker v. Westfield*, 39 Vt. 246.

Upon the question of whether the intestate conducted herself with due prudence, the whole condition of things as presented to her, and as it struck other persons who were present, were admissible. *Galena, Etc. Rd. Co. v. Fay*, 63 Am. Dec. 323; *St. Louis, Etc. Rd. Co. v. Murray*, 29 Am. St. Rep. 32; *Hemmingway v. Chicago, Etc. Ry. Co.*, 7 Am. St. Rep. 823.

The offer to show that other railroads managed their trains in the same manner as these trains were managed upon the morning of the accident, did not contain an offer to show that the use and conditions were similar; hence it was properly excluded. *George v. Haverhill*, 110 Mass. 506, 508, 512; *Berkshire, Etc. Co., v. Proctor*, 7 Cush. 417; *Lewis v. Smith*, 107 Mass. 334; *The Flagman Case*, 107 Mass. 496; *Hinckley v. Barnstable*, 109 Mass. 126; *Haynes v. Burlington*, 38 Vt. 350.

MUNSON, J. It appears from the exceptions that the defendant presented certain requests to charge, and that these requests were not complied with further than will appear from a transcript of the charge, which is referred to. No

copy of the charge having been furnished us, the questions raised upon it cannot be considered.

The physician who attended the deceased was produced as a witness by the plaintiff, and testified on inquiry that he had received no compensation for his services from the railroad company or anyone else. It is not shown that anything further appeared concerning his employment or the presentation of an account. The testimony was immaterial, and, standing alone, cannot have prejudiced the defendant.

It does not appear that the objection to the inquiries made of the witness Ward was disposed of otherwise than as a matter of discretion. It was within the discretion of the court to permit the plaintiff to prove matters pertaining to his case in connection with the cross-examination. The testimony already introduced by the defendant had made this evidence legitimate in rebuttal, and the court could permit its introduction before the defendant had rested. The order of testimony, both as regards the examination of the particular witness and the general course of the trial, is within the discretion of the court. *Pingry v. Washburn*, 1 Aik. 264; *Goss v. Turner*, 21 Vt. 437; *State v. Magoon*, 50 Vt. 333; *State v. Hopkins*, 56 Vt. 250.

The question asked the witness Folsom in cross-examination was answered adversely to the examiner. So the evidence which the defendant sought to introduce in re-examination was not in explanation or avoidance of anything obtained by the cross-examination. It was nothing more than an attempt to take up again the line of the direct examination and carry it to a further point. The refusal to permit this was not error.

The defendant excepted to the refusal of the court to receive proof that at four other points in New England the arrangement of tracks, and the method of drawing up trains for the discharge of passengers, were, and had been for years, substantially the same as at the place of the accident. As the

case stands, it is not necessary to determine whether the use of the same arrangements and methods in certain specified places may be shown, as tending to establish proper care on the part of the defendant. The plaintiff made no question as to the propriety of the arrangement of the defendant's tracks, or the construction of its platform, or its practice in the discharge of passengers under ordinary circumstances. His claim was that the conduct of the defendant was not what it should have been on the morning in question, in view of the increased danger resulting from the irregularity in the arrival of trains, and the unusual number of persons upon the platform. It was claimed that under these circumstances the passengers should have been discharged elsewhere or notified to remain in the car until the other train was in, or that the other train should not have been brought in as it was when the platform was thus crowded, or that some one should have been stationed there to protect or warn the passengers standing on the platform. The defendant's offer, if held to refer to the invariable practice as regards the movement of trains, did not, in terms, include the practice in regard to special precautions when trains are drawn up in the usual manner under circumstances of special danger; and we think the court below may properly have understood it to relate only to the established method of discharging passengers as dependent upon the arrangement of tracks. The discharge of passengers from trains drawn up in the same way may have been practiced at the points named, on occasions when the space between the tracks was unusually crowded, in connection with the exercise of special precautions to guard against the dangers incident to the method in such circumstances. The proposed evidence did not contain all the elements needed to show a substantial similarity of management under substantially similar circumstances. This was a sufficient ground for excluding it.

It is evident from the defendant's requests to charge that

the question whether the deceased voluntarily incurred the danger from which she suffered, while under the reasonable apprehension of a real or apparent danger, was one of the issues litigated. This being so, the evidence of Cephas Hill was admissible. Whatever would aid in placing before the jury the situation as it presented itself to the deceased was important in determining whether her conduct was negligent in the circumstances. The movement of the incoming train, its effect upon the conduct of others, the noise and confusion which surrounded the deceased, were proper subjects of inquiry. It was held in *Galena, etc., R. R. Co. v. Fay*, 16 Ill. 558; 63 Am. Dec. 323, that when the prudence of the person injured is in question, the conduct and exclamations of other persons exposed to the same danger may be shown.

The court erred in passing up the case upon a *pro forma* disposition of the motion to set aside the verdict on the ground that the damages were excessive. The motion was addressed to the discretion of the county court, and the defendant was entitled to have that court exercise its discretion. *Dunn v. Pownal*, 65 Vt. 116. The defendant can avail itself of this error under the exception taken. *Farrant v. Bates*, 60 Vt. 37.

Judgment reversed, and cause remanded for the correction of errors subsequent to the rendition of the verdict.

STATE v. E. J. WOODBURY.

OCTOBER TERM, 1894.

*Slaughter house. Common law indictment for maintaining.
Nuisance. Hypothetical question.*

1. A statute which is not manifestly repugnant to a former law will not be held to repeal it, unless it revises the whole subject-matter of the former law and is evidently intended as a substitute for it.
2. R. L., s. 3923, providing that the butchering business shall not be carried on without the written approval of the board of civil authority, and No. 82, Acts of 1892, empowering local boards of health to remove sources of filth, have not superseded the common law remedy by indictment for nuisance in the maintaining of a slaughter house.
3. In order that a slaughter house may become an indictable nuisance it is not necessary that the odors therefrom should endanger the public health, if they are seriously offensive to passersby.
4. *Held*, that the hypothetical question put to the expert for the state was proper, although it did not refer to all the evidence as to the results from the condition of things shown.

Indictment for nuisance in the maintaining of a slaughter house. Plea, not guilty. Trial by jury at the March term, 1894, Washington county, TYLER, J., presiding. Verdict, guilty, and judgment on verdict. The respondent excepts.

The hypothetical question referred to in the opinion was as follows :

"Q. I will make a supposition then; if cattle were slaughtered at that barn about ten or fifteen feet back from the front of it, and the entrails, and the blood, and the horns, and the bones that were thrown away, were thrown into the basement under that barn floor, and a hog pen was maintained under that floor during the hot season of the year, and there was more or less putrid flesh there and decaying matter, what would be the effect of such a condition of affairs to the health of the neighborhood, and to people passing and re-passing upon that highway?

"A. I think it would be deleterious."

The respondent excepted to both the question and the answer.

S. C. Shurtleff for the respondent.

The common law remedy has been superseded by statutory enactment. R. L., ss. 3924, 3925; Acts of 1892, No. 82, p. 90; *State v. Smith*, 7 Conn. 428; *State v. Hyde*, 11 Conn. 541; *State v. Smith*, 54 Vt. 403.

Zed S. Stanton, state's attorney, for the state.

The hypothetical question embraced all the material facts in the case and was proper. *Bishop v. Spinning*, 38 Ind. 143; *Rogers, Expert Tes.*, s. 25 and cases cited there; *Guitig v. State*, 66 Ind. 94; *Goodwin v. State*, 96 Ind. 550; *Quinn v. Higgins*, 53 Am. Rep. 305; *Yardley v. Cuthberton*, 56 Am. Rep. 218; *Gilman v. Strafford*, 50 Vt. 723; *Hathaway v. Life Ins. Co.*, 48 Vt. 335; *Johnson v. Caslle*, 63 Vt. 452.

It is not necessary to the creation of a nuisance that the public health should be affected. Wood on Nuisances, 766, 784, 785 and cases cited there; *Brady v. Weeks*, 3 Barb. 157,

MUNSON, J. R. L., 3923, provides that no one shall carry on the business of butchering in a building without the

written approval of the board of civil authority, describing the building and limiting the time during which he may carry on the business ; and imposes a penalty upon one who carries on the business without such approval or after the time limited. No. 82, Acts of 1892, authorizes the local board of health to abate all nuisances, sources of filth and causes of sickness ; imposes a penalty for a neglect or refusal to comply with its written order in that behalf ; and empowers it in case of such refusal or neglect to dispose of the nuisance at the expense of the owner or occupant of the premises. It is insisted that these provisions have superseded the common law relating to nuisances of this character, and that the offence charged in the indictment no longer exists.

An enactment which is not manifestly repugnant to the former law will not be held to repeal it, unless it revises the whole subject-matter of the former law and is evidently intended as a substitute for it. *Farr v. Brackett*, 30 Vt. 344 ; *State v. Smith*, 63 Vt. 201. We think the statutes relied upon come short of the requirement of this rule. The act of 1892 is confined to provisions for the abatement of nuisances ; and the abatement of a nuisance is not a punishment of the crime. R. L., 3923, prohibits the business except as licensed, and prescribes a penalty for carrying it on without a license. Neither clause can be held to repeal the old law. The common law offence can exist notwithstanding the requirement that all slaughter houses be licensed, and even though the particular one complained of is licensed. The doctrine that the state cannot complain of a nuisance which results from the doing of something which it has authorized applies only when the nuisance is a necessary result of the authorized act. If a licensed business which could have been carried on without becoming a nuisance is permitted to become one, the license will not bar an indictment. When licensed, the business is legalized, if properly carried on. If not licensed, it is an offence against the statute, however it may be carried

on. If it is not licensed, and is so carried on as to be obnoxious to the rules of the common law, it is an offence against the common law as well as against the statute, and may be punished as such. If the clause which prescribes a forfeiture repeals anything, it repeals only so much of the common law as relates to the punishment. Where there is a repeal of this character, although the offender must be punished in accordance with the statute, he may be indicted under the common law. 1 Bish. Cr. Law, s. 203.

The respondent cites *State v. Smith*, 54 Vt. 403, in support of his claim. That was an information for obstructing an ancient water-course to the injury of the highway. The statute provided that one who injured a highway by any of certain specified acts should, as a penalty, forfeit and pay to the treasurer of the town, to be expended in repairing highways, a sum not exceeding thirty dollars, to be recovered by the selectmen in an action in the name of the town. G. S. Ch. 25, s. 70. These provisions for the punishment of the offender were absolutely inconsistent with a proceeding by information or indictment; the phraseology was thought to indicate an intention that the penalty there provided should be the only one; and it was accordingly held that if the facts brought the case within the statute the respondent could not be punished by information. In this case the statute simply prescribes a forfeiture; and all fines, forfeitures and penalties imposed by statute, unless some other method is specially provided, are to be recovered by information or indictment. R. L., 1739.

The court charged that if the jury failed to find that the odors were of such a character as to endanger the public health, the respondent should nevertheless be convicted if they found the odors were such as to be seriously offensive to the people who passed. This was correct. It is not necessary that the place be such as to endanger health; it is sufficient if it be offensive to the senses. 1 Bish. Cr. Law, s.

1073. But the court charged that it would not be enough that people could detect it; and went on to say that it must be seriously offensive. It is said that the exact meaning of this expression has not been declared by any judicial tribunal. However this may be, we think it was a choice of words well adapted to protect the rights of the respondent, and one of which he cannot complain.

It is objected that the hypothetical question asked was not based upon the evidence as detailed in the exceptions, in that it was framed without reference to whether noxious odors were emitted from the premises, and without reference to the amount of putrid flesh which remained there. We think the question substantially covers the material things which the evidence of the state tended to establish. It was not necessary to include in the question the supposition that offensive odors were produced by the condition of things assumed. The state might properly, without regard to the other evidence which tended to show the escape of odors, prove by its expert that such a condition of things would produce exhalations that would be deleterious. It is objected that the phrase "more or less," used in regard to the amount of putrid flesh, is susceptible of meaning the smallest quantity. If a very small quantity, in connection with the other conditions named, would in the opinion of the expert produce deleterious effects, the respondent certainly cannot have been injured by the failure to assume the presence of a more considerable and more definite quantity.

Judgment that respondent take nothing by his exceptions.

JOHN N. BAXTER v. VILLAGE OF RUTLAND.

MAY TERM, 1895.

Condemnation of water rights. Fact that water power not utilized immaterial. Error must appear.

1. The fact that a water power has never been utilized does not prevent the riparian owner from recovering compensation for damages to the same when the water is taken for municipal purposes.
2. Where there is nothing upon the record to show that the commissioners and county court in fixing the amount of damages did not adopt the correct rule, the judgment will be affirmed.

Petition for the appointment of commissioners to assess the damages of the petitioner occasioned by the taking by the petitionee of the waters of East Creek. Heard upon the report of commissioners at the September term, 1894, Rutland county, START, J., presiding. Judgment for the petitioner for the amount named in the petition. The petitionee excepts.

C. L. Howe for the petitionee.

Geo. E. Lawrence and *F. D. White* for the petitioner.

The petitioner is entitled to recover damages in view of any use to which his water rights could be legitimately put, whether they have been actually used for that purpose or not. *Leonard v. Rutland*, 66 Vt. 105; *Lewis, Eminent Domain*,

sec. 61 *et seq*; *Bailey v. Woburn*, 126 Mass. 416; *Parker v. Griswold*, 17 Conn.

THOMPSON, J. The defendant, the Village of Rutland, condemned and took certain water flowing through the petitioner's land, to supply it with water. This proceeding is to recover such damages as accrued to him as a riparian owner, by reason of such taking. There are two available water privileges on his land which were affected and rendered less valuable by the taking of the water by the defendant. They have never been utilized, but this fact does not preclude the petitioner from recovering the damages thereto, resulting from such taking. They then were available for use, if the owner had seen fit to use them. He is entitled to recover of the defendant such a sum as will compensate him for the loss of the water for all available uses to which he, as riparian owner, legitimately might have put it at the time of the taking. *Hooker v. Montpelier & White River R. R. Co.*, 62 Vt. 47; *Leonard v. Rutland*, 66 Vt. 105; *Bailey v. Woburn*, 127 Mass. 416. The defendant in his argument concedes this to be the correct measure of damages, but contends that the commissioners must have assessed the damages upon some other theory. This does not appear from their report. The record does not show that the defendant filed exceptions to their report, nor does it appear that this question was raised in the court below, and consequently it is not before this court. The contrary not appearing, it is to be presumed that the commissioners and the court below adopted and applied the correct rule in respect to damages.

Judgment affirmed with interest and costs to petitioner.

L. C. DICKERMAN

v.

QUINCY MUT. FIRE INS. CO.

MAY TERM, 1895.

Agency cannot be shown by declarations of agent. Question of agency for the court. Evidence. General exception to charge.

1. When the declarations of an agent are offered upon the main issue, the question whether he was in fact agent is a preliminary one for the court.
2. If in determining this question the court receives other than legal evidence, it is error.
3. The declarations of an agent that he is such, made without the knowledge of the principal, is not evidence tending to show an agency.
4. That one has the blank proofs of loss of an insurance company is not evidence tending to show him the agent of the company.
5. To sustain a general exception to an entire portion of a charge, that portion as a whole must be erroneous.

Assumpsit upon a policy of fire insurance. Plea; the general issue. Trial by jury at the December term, 1894, Windsor county, Ross, C. J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

L. M. Read and J. J. Wilson for the defendant.

D. C. Dennison & Son and *William E. Johnson* for the plaintiff.

The exceptions to the charge cannot be sustained. They were to the entire charge, upon one branch of the case, and did not specify any defect. Such an exception is not fair to the court. *Goodwin v. Perkins*, 39 Vt. 605, 606; *Rowell v. Fuller*, 59 Vt. 696.

TAFT, J. That Morse was the defendant's agent could not be proven by his declarations and acts, unknown to the defendant. Whether he was such agent or not, in this case, was a preliminary question addressed to the court. *Cairnes v. Mooney*, 62 Vt. 172. The testimony to show the agency of Morse was admitted under exception; it is referred to and is from the witnesses, Tarbell, Whitham and the plaintiff. The property of the plaintiff was insured in three companies, and Tarbell testified that Morse left some blank proofs of loss of one company and was to send those for the other companies afterwards; whether he ever did or not the witness had no memory. The utmost that can be claimed from the testimony of Tarbell is that Morse agreed to send some blanks, for proof of loss in the defendant company. Whitham testified that Morse left blank proofs of loss of the defendant, with instructions to hold them, when executed, until further advised, "or something to that effect." That after such instructions neither he nor Tarbell, who was his partner, had any correspondence with the defendant, and that he did not "remember that there was anything further done about *that proof of loss*; the inquest came on, and the proceedings were delayed until that terminated." It does not appear that the blanks so furnished were ever filled out and executed. The contrary may be inferred from the testimony. The defendant testified that Morse said "he was agent for the Fitchburg and Quincy," and further testified, "I think he is treasurer for the Quincy

—I won't be certain." The conversation of Morse with the plaintiff was particularly objected to, and exception taken. These declarations of Morse that he was the agent of defendant was illegitimate testimony from which to find the fact of agency. We are unable to see that there was any testimony from the witnesses as above stated, and it was all there was in the case, that had a legitimate tendency to establish the agency of Morse. Illegal testimony, *i. e.*, the declarations of Morse, was certainly admitted. This, if there was no other reason, requires a reversal of the judgment. It was the duty of the court to exclude all testimony tending to show the admissions, declarations and acts of Morse until it had determined as a preliminary question that Morse was the defendant's agent. It is apparent from the record that the court did not so adjudge, at any time. The court and the plaintiff's counsel treated the question of agency as one for the jury, for the court said, referring to the testimony tending to show it, "We can't say what the jury would (may) find about it" (the agency); and plaintiff's counsel said, "If the jury do find so (that Morse was defendant's agent), then what was said between that agent and the plaintiff is admissible." In all the testimony referred to there is none that has any tendency to show the agency of Morse. The fact that he had blank proofs of loss of the company had not by itself any such tendency. An interloper whom the company never saw nor heard of, might obtain them. Nothing on the face of them imports that the bearer of them had any authority from the company to act in its behalf. As well might a bank be prejudiced by the possession of its blank cheques. The nearest approach to testimony in all that is detailed in the evidence is the statement of Mr. Whitham that Morse instructed him to hold the papers, the proofs, until further advised. Had it appeared that these papers or proofs were subsequently received by the company knowing of Morse's acts, and did not disavow them, it would be evidence tending to

show that he was its agent, and acting for them ; but nothing further was done in relation to the papers which Morse directed Whitham to retain until further advised. The proofs of loss which were in evidence, plaintiff's Ex. "A," are not written upon the blanks of any company, and there is no evidence tending to show that Morse ever heard or knew of them. The testimony of the plaintiff, "I think he (Morse) is treasurer of the Quincy—I won't be certain," is too vague, uncertain, and indefinite upon which to find that Morse was one of the defendant's officers. It does not tend to show it.

There being no testimony in the record tending to show Morse's agency, his admissions and declarations were not admissible upon the main question, and notice to him of the concurrent insurance was not notice to the defendant of that fact. This was a material fact ; indeed, it was the pivotal point in the case, for in no other way did the plaintiff attempt to avoid the defect in the proofs, of not truly stating the concurrent insurance. Had the defendant notice of the defect, it was its duty to have returned the proofs for correction. The admission of this testimony was vigorously contested ; eight times was the objection made with as many, save one, exceptions, the counsel contending, "It is not shown that Morse is an agent of this company."

The defendant excepted to that portion of the charge relating to the care and exertion the plaintiff ought to have exercised and employed in the saving of his goods ; the exception was general and to the whole charge on that subject. No specific error was pointed out. To entitle the defendant to a reversal under so general an exception, it must appear that the whole portion of the charge so excepted to was erroneous. The charge in the main was correct. The jury were told that it was the plaintiff's duty to make reasonable exertion to save his goods after he ought to have believed they would be burned or exposed to be burned ; to act like a reasonable, prudent, and careful man ; to save as much as he could ; to make

the loss as small as he could by the exercise of reasonable diligence, prudence, and care. That the plaintiff was under a duty to act as a prudent man would under the same circumstances. Some of the illustrations made use of by the court were not happily worded, but the legal principles were correctly stated. As the case must be remanded for a new trial, it is not important that the charge be critically scanned, it being in the main correct, and for that reason the plaintiff not entitled to have this exception sustained.

Judgment reversed and cause remanded.

E. G. BLAKE v. E. L. PRESTON.

MAY TERM, 1895.

Landlord and tenant. When relation will be implied.

1. Assumpsit for use and occupation will not lie unless the relation of landlord and tenant exists between the parties.
2. *Held*, that this relation did not exist upon the facts found.

Assumpsit. Plea, the general issue. Trial by court at the February term, 1895, Orleans county, MUNSON, J., presiding. Upon the facts found the court gave judgment for the defendant. The plaintiff excepts.

The plaintiff claimed to recover for the use and occupation of a certain room. The house in which this room was belonged to the defendant and had been leased by her to the

plaintiff. Previously to the possession of the plaintiff under the lease the defendant and her husband had kept house there. When they moved out the husband of the defendant said to the plaintiff that he would like to store a portion of his goods there until the house in which he was to live should be completed, and the plaintiff replied that they might be left there as well as not. The husband did accordingly store a part of his household goods in one of the rooms. Subsequently the husband removed a portion of these goods and the rest were put into a closet. After this the defendant came to the house, looked at the goods and locked up the closet. Thereupon the plaintiff told her that he must have the room. She replied that he could not have it, and he then notified her that so long as she retained possession she must pay rent at the rate of two and a half dollars per month. At a later date he notified her that she must pay five dollars per month.

The defendant did not own and had no interest in the goods. She never promised to pay rent, and claimed the right to occupy the room in virtue of the arrangement made with her husband.

Cook & Redmond for the plaintiff.

By continuing to hold the premises after notice that she must pay rent the defendant became liable. *Thompson v. Sanborn*, 52 Mich. 141; *Chamberlin v. Donahue*, 44 Vt. 57; *Griffith v. Knisely*, 75 Ill. 361; *Taylor's Land. & Ten.*, s. 19 (8th Ed.).

The law will imply a promise from the circumstances. *Ives v. Hulett*, 12 Vt. 314; *Paddock v. Kittredge*, 31 Vt. 378.

Dickerman & Young for the defendant.

In order to support an action of assumpsit there must be some promise by the defendant to the plaintiff, express or implied. *Moore v. Harvey*, 50 Vt. 297; *Stacey v. Ver-*

mont Cent. Rd. Co., 32 Vt. 551; *Watson v. Brainerd et al.*, 33 Vt. 88; *Chamberlin v. Donahue*, 44 Vt. 59; *Taylor, Land. & Ten.*, ss. 636, 637; *Hoffar v. Dement*, 5 Gill 132; 46 Am. Dec. 628; *Bancroft v. Wardwell*, 13 John. 489; 7 Am. Dec. 396.

By locking the door the defendant may have committed a trespass, but she did not promise to pay. *Turnpike Co. v. Smith*, 12 Vt. 212; *Peach v. Mills*, 14 Vt. 371; *Scott v. Lance*, 21 Vt. 507; *Stearns v. Dillingham*, 22 Vt. 625; *Winchell v. Noyes*, 23 Vt. 303; *Drury v. Douglass*, 35 Vt. 474; *Kidney v. Persons*, 41 Vt. 386; *Saville, Somes & Co. v. Welch*, 58 Vt. 683.

TYLER, J. To maintain the action of assumpsit for use and occupation, the relation of landlord and tenant must have existed between the parties, evidenced either by an express or implied contract creating that relation. The law will imply this relation from the fact of the occupancy of the premises with the consent of the owner; but this implication may be rebutted by proof of a contract, or of any other fact that is inconsistent with the existence of that relation. *Stacey v. Vt. Cen. R. Co.*, 32 Vt. 551; *Chamberlin v. Donahue*, 44 Vt. 57; *Moore v. Harvey*, 50 Vt. 297.

This relation was not created between the plaintiff and the defendant or her husband when the goods were placed in the room. The plaintiff gave his permission that they might remain there until the defendant's house was completed. But the plaintiff claims that this relation commenced the following May, from the finding that he then told the defendant that he must have the room; that she replied that he could not have it, and that the plaintiff then told her she would have to pay two and a half dollars a month for it. As the defendant did not engage the room, nor own the goods, nor cause them to be placed in the room, a tenancy by implication was not created, although she had visited the closet to which the plain-

tiff and her husband had moved the goods and had locked the door of the room when she left. The same is true in respect to the conversation between the parties in September. Had these conversations occurred between the plaintiff and the defendant's husband, who owned the goods, and who made the two agreements for their storage, a case would have been presented like that of *Amsden v. Blaisdell*, 60 Vt. 386, upon which the plaintiff relies. In each interview with the defendant she repudiated a tenancy and asserted a right (evidently from the agreements made between her husband and the plaintiff) to have the goods remain in the room.

Judgment affirmed.

S. S. CLEMMONS v. O. H. DANFORTH.

JANUARY TERM, 1895.

Slander. When words spoken in judicial proceeding are privileged. Exceptions. Request to charge.

1. Words spoken in a judicial proceeding are privileged only so far as they are material to the matter in controversy.
2. The plaintiff, a physician, presented a claim against the estate of a deceased person. The defendant, being interested in the estate, appeared before the commissioners to resist the allowance of the same, and there said, among other things, in reference to the plaintiff: "This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it and I can prove it." *Held*, not material and therefore not privileged.
3. A request to charge that certain words are actionable, is not faulty as to the words which are, because it embraces other words which are not.
4. Where the exceptions state the tendency of the testimony, it will be presumed that the whole tendency is stated.

Slander. Plea, the general issue. Trial by jury at the June term, 1892, Bennington county, MUNSON, J., presiding. Verdict and judgment for the defendant. The plaintiff excepts.

Batchelder & Bates and *O. M. Barber* for the plaintiff.

The defendant was not privileged until the hearing actually began. *Trolman v. Dunn*, 4 Camp. 211; *Lyman v. Gowing*, 6 L. R. Ir. 259.

There is no privilege as to words not pertinent to the issue. *Brown v. Hathaway*, 95 Mass. 239; *Hoar v. Wood*, 44 Mass. 193; *Gilbert v. People*, 1 Denio 41.

Waterman, Martin & Hitt for the defendant.

The occasion was privileged, and the privilege extended to whatever was said on that occasion. *Buckley v. Wood*, Cro. Eliz. 240; 16 Bac. Ab. 226; *Vanderzee v. McGregor*, 12 Wend. 545; 27 Am. Dec. 156; *King v. Root*, 21 Am. Dec. 102; *Bradley v. Heath*, 22 Am. Dec. 418; *McMellan v. Birch*, 2 Am. Dec. 426; *Calkins v. Sumner*, 80 Am. Dec. 738; *Shurtleff v. Stevens*, 51 Vt. 501; Town., Slander, s. 221; 2 Greenl., Ev., s. 422.

ROSS, C. J. The plaintiff is a practicing physician. He presented a claim against his father-in-law's estate for professional services rendered to the intestate and his wife. The defendant is an heir to the estate and interested to have defeated the allowance of unjust claims against it. The action is slander. The declaration charges, and the plaintiff's testimony tended to establish, that at the second meeting of the commissioners for the allowance of claims against the estate, upon the presentation by the plaintiff of an itemized account of his claim, the defendant, in the presence of the commissioners, his counsel and other persons, and before he was sworn as a witness, said: "I swear all these charges of Dr. Clemmons except his ten visits to mother are false and fraudulent. This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it and I can prove it."

The defendant did not justify by pleading the truth of the words charged, but denied having spoken them. His testimony tended to show that he did not speak the words charged; that what he did speak was after he was sworn

and while he was a witness ; and that if he said anything before he was called as a witness it was only that the plaintiff's account was unjust and fictitious, except the ten visits to his mother, and that he stated this in good faith, believing it to be true, for the protection of his interest and in discharge of his duty. In this state of the pleadings and tendency of the testimony, the plaintiff presented to the court several requests to charge. The second one only need be considered. That reads :

“ If the words, spoken before the defendant was sworn as a witness, were substantially as charged in the declaration, and were spoken touching the plaintiff in his profession and business, they are actionable in themselves, and the verdict should be for the plaintiff.”

This request is addressed to the facts as the plaintiff's evidence tended to establish them to be. If it embodies the law applicable to such a state of facts, it was the duty of the court to comply with it. It assumes that the occasion did not privilege, absolutely nor qualifiedly, what the defendant said relative to the plaintiff's having fabricated and collected charges for professional visits against him ; or that, if this was in a sense privileged, on the pleadings and evidence, the plaintiff was entitled to a verdict. The court did not comply with this request, except so far as to tell the jury that the words would be actionable unless privileged. It properly submitted to the jury to find what words were spoken on the occasion, and whether they were spoken before or after the defendant became a witness. It, in substance, told the jury that if they found that the defendant said before he was a witness all which the plaintiff claimed, and if they found it was more than was necessary to secure a proper contest of the plaintiff's bill, yet as the occasion was in a sense privileged, the plaintiff could not recover for such excess unless he established it was spoken maliciously. The plaintiff duly excepted to the refusal to comply with the request, and to this portion of the charge. The plain-

tiff's counsel concedes that the presentation of the plaintiff's claim to the commissioners was the commencement of a judicial proceeding, in which the defendant was a party in interest, and that the occasion gave him a qualified privilege in what he said, before he was a witness, in reference to the character of the claim presented; and that the plaintiff could not recover for the speaking of this portion of the words charged, unless he showed that the defendant took advantage of the occasion, maliciously, to characterize the charges—except those for ten visits to the mother—to be false and fraudulent, for the purpose of slandering the plaintiff, not believing what he said to be true. He further contends that if the defendant on that occasion went further and made the charge that the plaintiff had made up and presented against the defendant a false and fraudulent account and collected it, the charge was not, in a sense, privileged, because not pertinent nor material to the defence of the claim presented by the plaintiff; was actionable because injurious to the plaintiff in his profession and business and because plainly a charge of having obtained money under false pretenses; was, under the pleadings, conceded to be false, and therefore conclusively malicious. He further contends that, if the occasion could make this charge in a sense privileged, such qualified privilege could arise only when it was made to appear that the defendant made the charge in good faith, believing it to be true, and pertinent to a defence of the claim presented by the plaintiff. On either of these contentions, he claims his second request should have been complied with. These contentions bring for consideration the circumstances and occasion under which an actionable slander is privileged either absolutely or qualifiedly.

In respect to privilege, a party and his counsel or attorney stand alike. The counsel, or attorney, is the agent of the party, acting and speaking for him. At the common law,

judges, parties, jurors, counsel and witnesses were privileged absolutely for anything spoken or published "in a course of justice"; 4 Bacon's Ab. *499. In the earlier cases in England, counsel and the party and witnesses were not absolutely privileged for everything they might say in a judicial proceeding. But it was confined to what the party and his counsel might say, or do, in the conduct of the case, or what the witness might answer with reference to the inquiries put to him, and some of the cases intimate that their sayings and answers must be confined to what is pertinent or material to the matter under investigation. But the later decisions show a tendency, from public policy, to make this privilege absolute for everything which a party, his counsel, or a witness may say or do in the case. Odg. on Slan. & Lib., *189-194; *Seaman v. Netherclift*, 1 C. P. D. 540, and 2 C. P. D. 53. The privilege of a party and of counsel in respect to what they say and do in judicial proceedings, came early before this court in *Torrey v. Field*, 10 Vt. 353. The case was important, fully argued and carefully considered. The action charged that the defendant had in a bill in chancery, under the order of the chancellor, published a libel on the plaintiff. It is there said:

"This privilege, or immunity, for words spoken, extends equally to parliamentary proceedings, proceedings in the state legislatures, and in congress; to parties, witnesses, jurors, judges, and counsel in courts of justice; in short, to any one who, in the course of the discharge of public duty, or in pursuit of private rights, is compelled to participate in the administration of justice or in legislation. * * *

While, on the one hand, the party ought not to be required, in the course of judicial proceedings, to see to it that every allegation which he might deem for his interest to put upon the record, or which, in the ordinary course of such proceedings, it might seem necessary to publish, should, in the event of the suit, prove religiously true, it is evident, on the other hand, that no more ought he to be permitted under the guise and form of judicial proceedings to publish scandal and the basest slander without having any interest or occa-

sion to make such publication, except the gratification of personal malice. No person ought, in the course of judicial proceedings, even to publish that which he has no reason to believe, and does not in fact believe, and has no occasion to publish, except for secondary purposes. * * * If he publishes more than is warranted by the ordinary forms of process and pleading, or on an occasion not requiring it, he cannot claim the protection of a suitor in court."

Again, it is said :

"It does seem to be an admitted principle of the law of libel and slander that no action lies for anything said or written, or published, in the ordinary course of judicial proceedings, and which comes within the ordinary scope of the forms and process therein, however groundless or malicious the suit may be, even if the process of the court is sought as a mere cloak of malice or slander. * * * If the truth of the words is relied upon in justification it must be specially pleaded, but the defendant is not compelled to plead specially any matter which shows that the words were not spoken maliciously, but on a justifiable occasion, or that they were spoken by counsel, in the course of the discharge of his duty to his client, and were pertinent to the matter in question ; or in giving the character of a servant, or where the defendant had an interest in the question, and spoke the words in the reasonable and necessary pursuit and defence of that interest."

The defendant had filed several pleas in bar, setting forth and relying upon the publication under the order of the chancellor. The plaintiff had demurred to the pleas generally and specially. Speaking in regard to the order of pleading and the burden of proof, the court said :

"If the defendant did publish more than he was warranted in doing by the order, he is liable for the excess, if that contained scandal of a libellous character and was published with a malicious intent to defame the plaintiff and expose her to public disgrace, ridicule and contempt. But the excess should have been specially replied by the plaintiff, and would then stand as the basis of her claim for damages, and the question of the defendant's intent in the publication of the excess must be referred to the jury. For it is not to be tolerated, if the party shall in good faith publish more than

is strictly warranted by the chancellor's order, that he should be liable to an action on that account. But if he publish more, and the excess is libellous, he is *prima facie* liable, and it is incumbent on him to show that he was not actuated by any malicious intent in that portion of the publication. And the jury are not to infer that he was not actuated by malice, unless upon proof of some other motive."

This is clearly a holding that if the publication was in excess of the order, and was libellous, the plaintiff was entitled to recover, unless the defendant should show that he was not actuated by malice in publishing such excess.

In *Mower v. Watson*, 11 Vt. 536, the question of the privilege of counsel and party came again under consideration. The principles announced in *Torrey v. Field* were approved. After citing and remarking upon several cases, the court sums up by saying :

"From the foregoing cases the true ground of the privilege is readily deduced. *Prima facie*, the party or his counsel is privileged for everything spoken in court. If any one considers himself aggrieved, in order to sustain an action of slander, he must show that the words spoken were not pertinent to the matter then in progress, and that they were spoken maliciously and with a view to defame. So that if the words spoken were pertinent to the matter in hand, the party and counsel may claim full immunity from an action of slander, however malicious might have been his motive in speaking them. So, too, if the words were not pertinent to the matter in issue, yet if the party spoke them *bona fide*, believing them to be pertinent, no action of slander lies."

Torrey v. Field is referred to as stating the rule more fully. Hence what is here said is not to be taken as changing the burden of proof as laid down in that case. These decisions have been frequently recognized as correctly setting forth the principles governing this class of cases by this court and by other courts of last resort. *Nott and wife v. Stoddard*, 38 Vt. 25; *Dunham v. Powers*, 42 Vt. 1. In the last case a distinction is made between the privilege of a juror or witness, who acts as a part of the court, compul-

sorily, under oath, and the privilege of counsel who is acting for the protection of private interests; holding that the former are absolutely privileged for anything said in the ordinary course of proceeding or *bona fide*, while the latter is "only *prima facie* privileged for what he may say in the course of the proceeding and in which he participates." But speaking in the name and on behalf of his party, the privilege of counsel is the privilege of his party. This distinction between the privilege of a judge, juror or witness, and the privilege of a party and his counsel for words spoken or published, in the course of judicial proceedings, or for the assertion of private rights in such proceedings, is generally recognized by courts of last resort in this country. It is therein generally held that if it appears that the words spoken or published, or the assertion made, were spoken, published and made in the ordinary course of proceedings in a tribunal which has jurisdiction of the subject matter, with power to redress the complaint, and, if nothing further appears, the words of the party interested therein, and of his counsel, are *prima facie* privileged. But when it is made to appear that the words spoken, or published, are neither pertinent nor material to the subject matter under investigation, and are actionable, this *prima facie* privilege is removed. Many courts hold that only the truth of the words can be shown in defence. Other courts, and this in *Torrey v. Field, supra*, hold that the party or his counsel may show that he spoke the words in good faith, with probable grounds to believe, and on an honest belief, that they were true, and were pertinent or material to the subject matter under investigation, and in the assertion of the rights of the party therein. The latter courts hold that such further circumstances and conditions accompanying the speaking of actionable words on such an occasion, establish the good faith of the party or his counsel in using them and rebut malice. This, we think, is the result of the decisions of courts of final re-

sort in this country, and in harmony with the decisions of this court. *Gilbert v. People*, 1 Denio 41; 43 Am. Dec. 646 and note; *Stackpole v. Hennen*, 6 Martin 481; 17 Am. Dec. 187 and note; *Hastings v. Lusk*, 22 Wend. 410; 34 Am. Dec. 330 and note; *Bodwell v. Osgood*, 3 Pick. 379; 15 Am. Dec. 228 and note; *Tenvilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 429 and note; *Shadden v. McElwell*, 86 Tenn. 146; 6 Am. St. R. 821 and note; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338; 15 Am. St. R. 318 and note; *White v. Nichols*, 3 Howard 266; *Hoar v. Wood*, 44 Mass. 193; *Brow v. Hathaway*, 95 Mass. 239; *Rice v. Coolidge*, 121 Mass. 393; 23 Am. R. 279; *Hamilton v. Eno*, 81 N. Y. 116; *Commonwealth v. Wardwell*, 136 Mass. 164; *Boir v. Moore*, 187 Penn. St. 385; 30 Am. R. 367; *Upton v. House*, 24 Oregon 420; 41 Am. St. R. 863; *McLoughlin v. Cawley*, 127 Mass. 316, and 131 Mass. 70.

The last two cases, and especially *McLaughlin v. Cawley*, are instructive in determining when and how far matters arising in judicial proceedings are conditionally privileged. In *McLoughlin v. Cawley*, the defendant was an attorney, and was employed to bring an action against a party for falsely representing the plaintiff to be a trustworthy person, which representations had been acted upon and resulted to the damage of the party employing him. In his complaint, after setting forth the representations and that they were false, and known to be so to the party who made them, he proceeded to say that the party further knew that the plaintiff "had caused to be put to death, immediately after its birth, an illegitimate child born to him by," a person named. The plaintiff at the time had a wife living, so that the language inserted, in substance, charged him with having committed the crimes of adultery and murder. In his answer to the plaintiff's complaint the defendant denied specifically that he made the charge in the manner com-

plained of, and averred that if he did, the same was true and not libellous. On the trial he offered to testify that he believed the charge to be true, and offered to testify as to the information on which he made it, and that he was instructed to make it by his client. It was held that the charge was grossly libellous and actionable, was not privileged, because not pertinent nor material to the subject matter of the complaint, and could be justified only by showing its truth.

On the facts embodied in the request, if found established, what the defendant said on that occasion may be considered in two views; first, as spoken to his counsel in protection of his interest in his father's estate, and to defeat the allowance of an unjust claim; second, as spoken to the other heirs who had a like interest in the estate. In either view the occasion furnished only a qualified privilege. The cases falling under this kind of privilege, Mr. Odger, in his work on Slander and Libel, groups under three heads, the second of which is: "Where the defendant has an interest in the subject matter of the communication, and the person to whom he communicates it has a corresponding interest." As applicable to the three groups, he says, *197:

"But it must be remembered that although the occasion may be privileged, it is not *every* communication made on such occasion that is privileged. It is not enough to have an interest or duty in making a communication; the interest or duty must be shown to exist in making *the* communication complained of." (Per Dowse. B., 6 L. R. Ir. at p. 269.)

A communication which goes beyond the occasion "exceeds the privilege."

Again, p. *229, he says, under the heading of "Statements necessary to protect defendant's private interests":

"Any communication made by the defendant is privileged which a due regard to his own interest renders necessary. He is entitled to protect himself. But in such cases it must clearly appear not merely that some such communication was necessary, but that he was compelled to employ the very words complained of. If he could have done all that his

duty or interest demanded without libelling or slandering the plaintiff, the words are not privileged. Thus, it is very seldom necessary in self-defence to impute evil motives to others, or to charge your adversary with dishonesty or fraud. * * * So, too, in cases where some such communication is necessary and proper in the protection of the defendant's interests, the privilege may be lost if the extent of its publication be excessive."

Again, on same subject, p. *245 :

"So, too, in making a communication which is only privileged by reason of its being made to a person interested in the subject matter thereof, the defendant must be careful not to branch out into extraneous matter with which such person is unconcerned. The privilege only extends to that portion of the communication in respect to which the parties have a common interest or duty."

Cases are cited in the illustrations supporting these propositions. Apply these principles to the facts embodied in this request. The only subject matter for the consideration of the commissioners, the defendant's counsel and the other heirs, was the claim of the plaintiff for professional services. The only interest which he or the other heirs had was to defeat the allowance of that portion of it which they thought unjust. For this purpose he might, if he had reasonable grounds, characterize a portion of the claim as false and fraudulent and be protected by the occasion. But when he proceeded to say : "This isn't the first time he has made up an account, either. He made one up against me of between forty and fifty dollars, for which he hadn't made a visit, and I paid it and I can prove it," he stated what had no relation to the claim presented by the plaintiff ; what the other heirs had no interest in ; what was between himself and the plaintiff personally ; what he claimed to have personal knowledge of. He made a charge, wholly disconnected with the claim presented by the plaintiff, and with his own interest and the interest of the other heirs therein—a charge which was actionable, which he does not claim to be true, nor that he had

reasonable grounds to believe to be true, either by his testimony or his pleadings. Under the circumstances, the occasion did not privilege nor protect him in making the charge. If it should be contended that, being interested to defeat the unjust portion of the plaintiff's claim, he made this charge that the plaintiff had made and collected charges against him for which he had rendered no services, to his counsel and to the other heirs to induce them to join in defending against the unjust portion of the plaintiff's claim, the contention cannot be maintained. On the pleadings and on his own evidence, the defendant does not claim that this part of the charge was true, nor does he claim that he had reasonable grounds to believe, and that he did honestly believe, it to be true and pertinent to a defence of the claimed unjust charges of the plaintiff. A party is neither absolutely nor conditionally privileged to utter to his counsel, and to those jointly interested with him in defending a particular matter, and to others not so interested, a false and actionable slander of the other party to the matter in controversy, not in any way pertinent nor material to the matter in controversy, to induce those jointly interested, and his counsel, to join him in defending the matter in controversy. He has no interest nor duty to make such a charge. It will be wholly unavailing and injurious to himself and to those jointly interested. If he succeeds in securing the aid of the others jointly interested, it will lead him and them into unsuccessful litigation, so far as the same is dependent upon the charge. His failure either to justify the charge as true, or to show that he had reasonable grounds to believe, and that he did honestly believe, it to be true and pertinent, negatives that he made it in good faith. Privilege arises from interest and duty. It does not arise out of an occasion in which no interest nor duty to make the slanderous utterance is shown to exist. This request should have been complied with, inasmuch as on the pleadings and on

the facts which the testimony tended to establish, as the case was left at the close of the testimony, the occasion did not privilege the utterance of the charge, even under the decisions which allow malice to be negatived by showing that the defendant made the charge in good faith, on reasonable grounds, and in the honest belief that they were true and pertinent. The request was not faulty in that it contained also a charge spoken on the same occasion which, on the evidence, was conditionally privileged; for, if the defendant spoke on the occasion all that was embraced in the request, the plaintiff would be entitled to recover, for the excess which was not privileged. It is not to be presumed that there was evidence in the case tending to establish that the defendant had reasonable grounds to believe, and did honestly believe, that this part of the claimed utterance, if made, was true and pertinent to the plaintiff's claim then under consideration. When the exceptions purport to state the tendency of the testimony on a point excepted to, it will be presumed that it states its whole tendency, inasmuch as the statement is made for the purpose of showing the point and scope of the exception. *Armstrong v. Colby*, 47 Vt. 359. Limited as it was by the charge, the testimony excepted to was properly received.

Judgment reversed and cause remanded.

ALLEN L. GRAVES ET AL.

v.

H. W. MATTISON.

MAY TERM, 1895.

Construction of deed. Description. Lateral support of adjoining lands. Injunction.

1. The most important rule in the construction of deeds is that the intention of the grantor, if not unlawful, shall govern.
2. A, being the owner of a tract of land, conveyed to B a parcel forty-seven feet wide from the westerly side. The point of beginning was the northwest corner and the deed located this as forty-five feet from the north-east corner of a certain store. Subsequently A conveyed to C a second parcel from the same tract easterly of and adjoining the first parcel. The point of beginning in this deed was the northwest corner of the parcel which was described as ninety-one feet from the same store corner, being the northeast corner of the first parcel. The west line of the last parcel was described as running along the east line of the first parcel. *Held*, that it was the manifest intention of the grantor that the west line of the second parcel should be coincident with the east line of the first parcel and that the ninety-one feet must be rejected as surplusage.
3. A land owner is entitled to the lateral support of his soil in its natural condition, but not as to any artificial structure placed upon it.
4. Therefore an injunction will not be granted to restrain a land-owner from erecting the foundations of his building upon such a level that the adjoining owner cannot rebuild his foundations without removing the lateral support of the first.

Bill for an injunction. Heard at the June term, Bennington county, 1894, upon the pleadings and a master's report. TAFT, chancellor, decreed for the orators. The defendant appeals.

J. C. Baker for the orators.

The intention of the parties to a deed must govern. *Clement v. Bank*, 61 Vt. 298; *Cummings v. Black*, 65 Vt. 76; *Robinson v. Railroad*, 59 Vt. 426.

The manifest intent here was that the west line of the first parcel and the east line of the second parcel should be the same, and those parts of the description which contradict this must be rejected. *Sherwood v. Whitney*, 54 Conn. 330; *Flagg v. Eames*, 40 Vt. 16; *White v. Gay*, 9 N. H. 126; *Erskin v. Moulton*, 66 Me. 276; *Norwood v. Byrd*, 42 Am. Dec. 406; *Collins v. Lavelle*, 44 Vt. 230; *Blanchard v. Morey*, 56 Vt. 174.

One must so use his own property as not to injure another. If the defendants place their foundations as they have begun, the orators cannot reconstruct their walls. *Fish v. Dodge*, 4 Denio 311; *Ross v. Butler*, 19 N. J. Eq. 294; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201; *Heeg v. Licht*, 80 N. Y. 579; *Powder Co. v. Tierney*, 131 Ill. 322; *Russell v. Brown*, 63 Me. 203; *Canal Co. v. Hitchings*, 65 Me. 140; *Holmes v. Wilson*, 10 Ad. and E. 503.

Equity has jurisdiction. *Wood on Nuisances*, s. 769 et. seq.; *Sullivan v. Royer*, 72 Cal. 248; *Canfield v. Andrews*, 54 Vt. 1; *Whipple v. Fair Haven*, 63 Vt. 221; *Trowbridge v. True*, 52 Conn. 190; 2 Beach, Injunctions, s. 1024.

C. H. Darling for the defendant.

One is only entitled to the lateral support of his soil in its natural condition. *Thurston v. Hancock*, 12 Mass. 220;

Gilmore v. Driscoll, 122 Mass. 199; *McGuire v. Grant*, 25 N. J. L. 356; *Richardson v. Vt. Central Rd. Co.*, 25 Vt. 465.

THOMPSON, J. I. January 28, 1870, Ezra Edson was the owner of a tract of land embracing the lands of the orators and defendant, described in the master's report. By deed of that date, he conveyed from the westerly end of this tract, a piece of land to D. P. Walker, described as follows :

"Beginning forty-five feet east of the northeast corner of Geo. W. Smith's brick store in the village of Factory Point, at a stake and stones standing in the junction of the road leading to Beech & Lee's shop with the main highway; thence easterly on the south side of said highway forty-seven feet to a stake and stones standing eighteen inches east of the northeast corner of the meat market; thence southerly parallel with the east side of said meat market forty-six feet to a stake and stones standing on the north side of said road leading to Beech & Lee's shop; thence northeasterly on the north side of said road sixty feet to the place of beginning."

By successive conveyances the title to this piece of land conveyed to Walker, came to the defendant Feb. 27, 1894.

April 1, 1873, Edson conveyed from the tract of land so owned by him, another piece of land on the east of and adjoining the piece previously conveyed to Walker, to one Omar M. Howe, by the following description :

"Beginning on the south line of the highway leading through the village of Factory Point, ninety-one feet east of the northeast corner of the brick store of Burton & Co., and at the northeast corner of the drug store lot of D. P. Walker; thence easterly on the line of said highway thirty-five and one-half feet; thence southerly parallel with the east line of said drug store sixty-three feet to the north side of the road leading to Beech's wagon shop; thence on said last mentioned road westerly to the southeast corner of said drug store lot; thence northerly on the east line of said drug store lot to the place of beginning."

By successive conveyances, the title to this piece of land conveyed to Howe, came to the orators, Allen M. Graves

and Helen M. Colburn, and at the commencement of this suit, they were, and now are, the owners of the same.

The brick store of George W. Smith, and of Burton & Co., are identical, and it still stands where it stood when said deeds were given, and is the only monument now standing which is referred to in the deed from Edson to Walker, and in the successive conveyances of that lot. The master finds that the easterly line of the Walker lot was at right angles with Main street and parallel with the east line of the brick store.

January 1, 1880, Edson conveyed to Emerson Estabrook the land lying easterly of and adjoining the lot conveyed to Howe, and by successive conveyances the title to the same came to the defendant July 17, 1882, and he is now the owner thereof. This is the lot upon which he is erecting a brick block, the northwest corner of which extends over upon the orators' lot ten inches, covering a strip of land ten inches wide at that point, and running to a point about seven feet southerly from the corner, if the orators' lot is located as they claim.

The main question in dispute is as to the true location of the westerly line of the defendant's land last mentioned, and the easterly line of the orators' land, which lines are identical.

The master finds and reports that it was conceded by both parties, that the orators' lot is thirty-five and one-half feet wide. It does not appear that either the orators or the defendant, in respect to each other, have gained or lost any land by adverse possession.

The northeast corner of the Walker lot is ninety-two feet east of the northeast corner of the brick store. The northwest corner of the orators' lot as described in Edson's deed to Howe is ninety-one feet east of the northeast corner of the brick store and at the northeast corner of the Walker lot. The defendant contends that the distance of "ninety-one

feet" must prevail, while the orators insist that the northeast corner of the Walker lot is so certain and definite that it must prevail as the orators' northwest corner, and the "ninety-one feet," be rejected as repugnant to the clearly expressed intention of the grantor, Edson.

Among the rules that obtain in the construction of deeds, perhaps none is more important than the rule that the intention of the grantor, if not unlawful, shall be given effect, especially when it can be ascertained from the deed itself. There are numerous cases to this effect, among which are *Flagg v. Eames*, 40 Vt. 16, and *Clement v. Bank of Rutland*, 61 Vt. 298.

When Edson conveyed the lot to Howe, it is not to be presumed that he undertook to convey land that he did not own. He then owned sufficient land easterly of and adjoining the Walker lot, to make the Howe lot thirty-five and one-half feet wide. If the stake and stones once marking the site of the northeast corner of the Walker lot could now be found, that monument would dominate over all other evidence and determine the location of that corner, because that would be fixed and certain. In the absence of a fixed monument, the next most certain data by which the location of a corner can be determined, is *distance* from a fixed and certain object. *Grand Trunk Ry. Co. v. Dyer*, 49 Vt. 74. The northeast corner of the brick store is a certain and fixed object, from which the distance, ninety-two feet, is to be measured east, to determine the location of the northeast corner of the Walker lot. As the easterly line of this lot was at right angles to Main street, which we take to be the main highway referred to in the deed to Walker, and parallel with the east line of the brick store, the site of its northeast corner is fixed with certainty. Indeed, no question is made by the defendant either as to its location, or as to its being readily found from the data available for that purpose, but on the contrary, he admits that it is located ninety-two

feet east from the brick store as described in the deed to Walker. In the deed to Howe, the grantor specifically makes the northeast and southeast corners, and the east line of the Walker lot, the westerly boundary of the Howe lot. The last course of the description in that deed is from the *southeast* corner of the Walker lot, northerly *on the east line* of that lot, to the place of beginning. This course, if followed, must locate the point of beginning ninety-two feet, instead of ninety-one feet, east of the northeast corner of the brick store.

The master correctly found the easterly line of the Walker lot to be ninety-two feet easterly from the easterly line of the brick store. These lines are parallel with each other. Thus it is apparent that it was the purpose of Edson to convey to Howe a piece of land thirty-five and one-half feet wide on the highway, beginning at the northeast corner of the Walker lot, and out of land east of and adjoining that lot, and this intention must prevail and the ninety-one feet must be rejected as repugnant to the other bounds, and the expressed intention of the grantor. It follows from this that the orators' northwest corner is the northeast corner of the Walker lot, and their easterly line is the line claimed by them.

A portion of the defendant's building and the foundation thereof, are erected upon the orators' lot, and in respect to them, they are entitled to the relief prayed for.

II. The orators also pray to have the defendant enjoined from making further erections upon his walls resting upon earth immediately against their old walls, which they must remove in constructing their new building. The master finds that the old cellar wall of the orators, still standing, was so injured by the fire which destroyed their building, that it should be rebuilt before any erection is placed upon it, and that the defendant's foundation is built upon soil which is coarse gravel, about four feet above the bottom of

the orators' wall, and is within a few inches at the north end and about four feet from the south end, of this wall. As the defendant's wall is now built the orators cannot remove their wall for the purpose of rebuilding it, without great danger of the walls of the defendant's building falling, unless something is done to support them. The orators intend to rebuild. Owing to the peculiar nature of the soil, the only practical way, in order that the defendant's wall should not require the lateral support of the orators' wall, is that the defendant's wall be rebuilt at as low a level as the foot of the orators', or be otherwise supported, or that the orators' cellar be filled to a level with the foot of defendant's wall. To rebuild or otherwise support the defendant's foundation is practical, but would be somewhat expensive. Without support, the defendant's wall as it now stands, prevents the orators from rebuilding upon the site of the building destroyed. While the defendant was constructing his wall, the orators called his attention to their intention to rebuild, and requested him to place the foot of his wall at a lower depth or on a level with the foot of their wall, which he refused to do. On these facts the orators insist that they are entitled to the relief asked for in respect to this phase of the case.

If the defendant keeps his building and its foundation within the bounds of his own land, he has the legal right to erect them as near the line between his land and that of the orators, and as high above and as deep below, the surface of the soil as he sees fit to do. While the wisdom of the act might be questionable, by erecting them on the line, he would be in the exercise of such legal right, and would violate no legal right of the orators. *Hubbard v. Town*, 33 Vt. 295.

The law in this state in respect to the right of a land owner to have his soil supported by that of the adjacent owner, is not an open question, and is stated in *Hatch v.*

Vt. Cent. R. R. Co., 25 Vt. 49; *Richardson v. Vt. Cent. R. R. Co.*, 25 Vt. 465, and *Beard v. Murphy*, 37 Vt. 99. In the latter case the court by Poland, C. J., says:

"It is now well settled that the owner of land is entitled to have it supported and protected in its natural condition, by the land of his adjoining proprietor, and that if such adjoining owner remove such natural support, whereby the soil of the former is disturbed or falls away, he is legally liable for all damage so occasioned. * * It is also equally well settled, that the owner of land is not entitled to claim the support of the adjoining soil for any artificial structure he may erect upon his land, which increases the lateral pressure, and that for any damages to such artificial structure, caused by the removal of the natural support of the soil by such adjacent proprietor, he is not liable unless he is guilty of carelessness and negligence in his manner of making the removal, or he fails to give prior notice thereof to the owner of the structure, so that he may take the necessary measures for the protection and preservation of his property from the consequence of such act."

This is the law determining and controlling the right of the orators to excavate on their land adjoining the defendant's land, and subject to its limitations, they have a right to dig and excavate on their land as they see fit to do.

If, as a result of lawful excavating on their lot by the orators, the defendant's building should fall or slide upon their land, it is not necessary to now decide whether or not he would be liable for all damages occasioned thereby.

The respective rights of the parties to build and excavate, being as stated, the orators are not entitled to have the defendant enjoined from making further erection upon his walls resting upon earth immediately against their old walls, so far as his walls stand upon his own land.

The decree in the court of chancery was for the orators in accordance with the entire prayer of the bill, and therefore must be reversed.

Decree reversed and cause remanded with mandate that

decree be entered for the orators adjudging their easterly line to be located as found by the master, and perpetually enjoining the defendant from erecting any walls, buildings and superstructures upon the land of the orators, and decreeing and ordering that the defendant remove from the land of the orators, all brick walls, stone walls, buildings and superstructures of any and every kind, erected or placed by him upon the land of the orators, by a time to be fixed by the court of chancery.

A. J. CROSBY v. ENTERPRISE CHEESE CO.

MAY TERM, 1895.

Appeal. When specifications exceed twenty dollars.

Where the entire amount which the plaintiff seeks to recover as damages for a breach of the defendant's contract is less than twenty dollars, the suit is not rendered appealable by the fact that that sum is arrived at by the apportionment between several delinquents, of which the defendant is one, of a larger sum, the contract with the defendant being several.

Petition for an appeal from the judgment of a justice upon the ground that the same had been denied by reason of fraud, accident or mistake. Heard at the December term, 1894, Windsor county, Ross, C. J., presiding, upon general demurrer to the petition. Demurrer sustained and petition dismissed with costs. The petitioner excepts.

The petition set forth, in substance, that the Enterprise Cheese Company, the petitionee, had brought suit against the petitioner, claiming as damages the sum of twenty dollars; that the petitioner had appeared and defended said suit; that a trial by jury had been had and verdict returned for the petitionee, and judgment entered upon that verdict, from which the petitioner prayed an appeal, which was denied.

The petitionee, to sustain the issue upon its part upon that trial, introduced a written contract between itself and the petitioner by which the petitioner agreed to deliver at the factory of the petitionee the milk of four cows during the term of three years from May 1st, 1890, and introduced testimony tending to show that the petitioner had not delivered milk according to said contract.

The petitionee claimed to recover the sum of nine dollars and seventy-five cents damages, that sum being arrived at in the following manner: The petitionee entered into a contract with one Aldrich to furnish him at its factory the milk of three hundred cows for three years from May 1st, 1890, in consideration of which said Aldrich agreed to manufacture the milk into cheese for an agreed price per pound. For the purpose of securing this quantity of milk, the petitionee entered into contracts with various persons similar to that with the petitioner. These contracts were not filled, and the petitionee did not consequently furnish Aldrich with the agreed amount of milk, and by reason of its failure to do so, was obliged to pay him the sum of one hundred and fifty dollars as damages. A committee was appointed to apportion this amount among the several parties who were delinquent in the same manner as the petitioner, and they determined that the amount chargeable to the petitioner was said sum of nine dollars and seventy-five cents. The jury returned a verdict for that amount.

Gilbert A. Davis for the petitioner.

J. J. Wilson and J. C. Enright for the petitionee.

TAFT, J. This cause is a proceeding to enter an appeal from a judgment of a justice of the peace. The only question is whether the "specifications or exhibits of the plaintiff on trial" exceeded twenty dollars. If they did, the petitioner was entitled to an appeal. At the trial before the justice the petitionee presented a claim of nine dollars and seventy-five cents, being that part of one hundred and fifty dollars which it claimed the petitioner was liable to pay (the former having paid that sum as damages to one Aldrich for not furnishing him with the quantity of milk which it had agreed to do) and claimed the petitioner was liable to pay his share of the whole sum, proportioned among all the patrons delinquent in furnishing milk to the factory. The petitionee's books, showing the amount of cheese made and the prices at which it was sold, the tally sheets showing the amount of milk received daily, and the contract between the petitionee and Aldrich, the cheese manufacturer, were in evidence, and the petitioner claims they were "specifications or exhibits of the plaintiff on trial." They were in evidence in the case; means of proof by which the petitionee established its demand, but were not in any sense a specification or exhibit of its claim. The petitionee's claim was nine dollars and seventy-five cents for money paid Aldrich on account of the petitioner not furnishing the milk he had agreed to furnish, and that was all the claim shown by any of the papers in evidence. The case was not appealable; the judgment was correct and the same is

Affirmed.

ST. JOHNSBURY v. WATERFORD.

MAY TERM, 1895.

Pauper. Emancipation. Residence.

1. A person helpless in body, but with normal mental faculties, is presumed to become emancipated upon attaining his majority, although he continues to reside in his father's family.
2. A three years' residence of this character is sufficient to charge a town with the support of the person as a pauper, although the father actually supported him, provided no aid was furnished by any town.

Assumpsit to recover expenses incurred in the support of a pauper. Heard upon an agreed statement of facts at the December term, 1894, Caledonia county, MUNSON, J., presiding. Judgment for the plaintiff. The defendant excepts.

The plaintiff sued for the support of one Esther Cushman from March 16, 1893, to the date of the writ, October 4, 1894. The material part of the agreed statement of facts was as follows:

"The pauper, Esther Cushman, is sixty-eight years of age, and from her infancy has been physically perfectly helpless; mentally, she is a bright woman. She lost the use of her hands, feet and limbs in her infancy, and never regained them. She was born in Waterford, where her family was then living. About forty-six years ago her father deserted his family, then living in Waterford, and never returned to it, and died about eighteen years since. His wife, the mother of the pauper, with the aid of a son, Ezra Cushman, for some years kept up the home and supported her there without aid from any town.

"In 1853 a sister of Esther married a Mr. Hurlbutt, and the mother and Esther went to reside with them on a farm in Waterford as members of the family. There the family resided for about one year, and then moved to a farm in Danville. About twenty years ago the family moved to St. Johnsbury, where Mrs. Hurlbutt's husband deserted her, about twelve years since. At these removals from Waterford to Danville and from Danville to St. Johnsbury, Esther and her mother accompanied Mrs. Hurlbutt, and in all said residences made up a part of the family. The pauper needed the care and nursing of the mother, and was never separated from her but two weeks down to the time her mother died, about five years ago. The defendant town for a time before the pauper removed from Waterford to Danville—that is, from some time in 1851—paid a certain sum per year to the head of the family in which the pauper was supported toward Esther's support, and all contracts were made by the town yearly and paid each quarter. While Mrs. Hurlbutt's husband was at home contracts were made with him for the pauper's support, and payments were made to him. After he deserted his home the defendant contracted with Mrs. Hurlbutt each year and paid her each three months. The amount thus paid to Mrs. Hurlbutt and to the others named before her was not enough, in fact, to pay the actual cost of the pauper's support, but to enable the family to keep her with them. While the pauper was residing with Mrs. Hurlbutt's family in the town of Danville, and while temporarily away visiting, she was either carried or went voluntarily to the poor farm of the defendant town. It does not appear who, if any one, carried her there. After the pauper had been at the poor farm, or elsewhere, about two weeks, her mother became uneasy about her, and sent Mr. Hurlbutt to bring her back to their home at Danville; and the pauper ever after remained as a part of Mrs. Hurlbutt's family down to the bringing of this suit, March 16, 1892. The defendant town contracted with Mrs. Hurlbutt to keep the pauper, as she had done, for the coming year in her family, and agreed to pay each three months. It did so down to and including the fourth quarter ending March 16th, 1893, when defendant's overseer notified Mrs. Hurlbutt that the town would not any longer pay for the pauper's aid or support, and that it was under no legal obligation to do so.

"The pauper was being supported to the extent and in

the manner aforesaid at the time when she was removed from Waterford and at the time when she came to St. Johnsbury, as well as at all other times since the defendant began to pay toward her support. The removal of the Hurlbutt family, including Esther and her mother, from Waterford to Danville and from Danville to St. Johnsbury, were made without the procurement of or interference or objection by the defendant town and with the intention on the part of Mrs. Hurlbutt to reside in the town to which the removal was made. The removal to St. Johnsbury was made about 1872, and ever since then the family has lived in St. Johnsbury, and Esther has been supported in the manner hereinbefore stated.

“Esther was supported by her father until he deserted his family, as before stated, and thereafter was supported by her mother and brother until the year 1851, and until the defendant town began to aid in her support in that year, and until the defendant town so began to furnish aid no aid was furnished towards her support by any town. Esther was born and always lived there until the removal to Danville, as before stated.”

Bates & May for the defendant.

The pauper was not emancipated and never acquired a three years' residence in her own right. *King v. Roach*, 5 T. R. 247; *Wells v. Westhaven*, 5 Vt. 326; *Lowell v. Newport*, 66 Me. 78; *Rowell v. Vershire*, 62 Vt. 405; *Durfee v. South Burlington*, 65 Vt. 412; *Marshfield v. Tunbridge*, 62 Vt. 455; *Craftsbury v. Greensboro*, 66 Vt. 585; *Londonderry v. Landgrove*, 67 Vt. 264.

W. P. Stafford for the plaintiff.

The pauper never supported herself in the plaintiff town, but was always assisted by the defendant. Hence she was transient, and her last three years' residence was in the defendant town. *Leicester v. Brandon*, 65 Vt. 544; *Sandgate v. Rupert*, 67 Vt. 258.

She was emancipated. Her mental faculties were perfect and she could choose where she would live. *Topsham v. Chelsea*, 60 Vt. 220; *Westmore v. Sheffield*, 56 Vt. 239.

ROSS, C. J. The pauper, Esther Cushman, is normal, intellectually, in understanding, and in will power. Physically, she is helpless, having lost the use of her hands, feet and limbs in her infancy. After attaining her majority she is presumed to have become emancipated and to have chosen her place of residence, unless the contrary is shown. *Ludlow v. Landgrove*, 41 Vt. 137; *Westmore v. Sheffield*, 56 Vt. 239; *Hardwick v. Pawlet*, 36 Vt. 320. The pauper continued to reside in her father's family about four years after attaining her majority, as she had done before. The agreed case does not state that she was unemancipated during this period, nor that such residing was not from her will and choice. There is not a fact stated to show that her residence was controlled by the will of the father, against her will. She was helpless, and needed the care and nursing of her mother. These facts are not inconsistent with emancipation during this period. Notwithstanding these facts, her residence during this period in her father's family, in Waterford, may have been, and doubtless was, in accordance with her choice, wish and judgment. The county court was not required to make any finding of fact, nor inference, from the facts agreed upon. In 1848, when she was twenty-one years old, the father deserted his family and never returned to it. This act was a relinquishment and abandonment of all care and control of the pauper. From 1848 to 1851, the pauper continued to reside in Waterford, as she had done from her birth, but in the family of her mother and brother. The mother and brother were never entitled to the control of the pauper, nor under a legal obligation to support her. She is presumed to have resided with them from choice. That the father, for the first four

years, and the mother and brother, for the remaining period, furnished her support, inasmuch as she was unaided by the town, did not defeat her from gaining a three years' residence in Waterford. *Craftsbury v. Greensboro*, 66 Vt. 585. In 1851 the town of Waterford commenced to aid in supporting the pauper, and continued that aid until March 16, 1893, when the plaintiff town was called upon and commenced to support her. The pauper then had resided in Waterford, continuously, more than three full years, supporting herself within the meaning of the statute. She never resided in any other town for three full years supporting herself within the meaning of the law. While in Danville and while in St. Johnsbury, to March 16, 1893, the town of Waterford contributed to her support. The last and only three years' residence of the pauper in her own right being in Waterford, it was the legal duty of that town, so far as regards the plaintiff, to continue to support her.

Judgment affirmed.

GUY WILSON v. G. J. WALLACE.

GENERAL TERM, 1893.

Power to sell vitiates chattel mortgage, though given after mortgage. Subrogation.

1. A provision in a chattel mortgage giving the mortgagor the absolute right to dispose of the entire property in one transaction for his own benefit vitiates the mortgage.
2. It is the same whether the permission is contained in the mortgage itself or is by independent agreement, and whether it is given at the time the mortgage is executed or subsequently.
3. In such case the fact that the mortgagee has paid off a prior mortgage on the property does not help his title as against an attachment made prior to such payment.

Assumpsit. Plea, the general issue. Heard upon the report of a referee at the December term, 1892, Windsor county, TYLER, J., presiding. Judgment for the defendant. The plaintiff excepts.

J. J. Wilson for the plaintiff.

A stipulation in a chattel mortgage that the mortgagor may sell avoids the mortgage. *Putnam v. Osgood*, 51 N. H. 192; *Coolidge v. Melvin*, 42 N. H. 510; *Collins v. Myers et al.*, 16 Ohio 547; *Standard Implement Co. v. Schultz et al.*, 45 Kan. 52.

Hunton & Stickney for the defendant.

The mortgage was not void. *Peabody v. Landon*, 61 Vt. 318.

MUNSON, J. The suit is brought to recover the price of a colt which plaintiff sold defendant at a sheriff's sale. The defendant contests the suit on the ground that the colt has been taken from him by virtue of a valid chattel mortgage. The plaintiff did not recognize the mortgage, but sold the property as not incumbered. The mortgagee had an understanding with the mortgagor, before the property was attached, that the mortgagor might sell the mortgaged property as he wished to, and use the avails if he wished to.

The question raised by this understanding is different from that determined in *Peabody v. Landon*, 61 Vt. 318. It was there held that a permission to sell in the ordinary way a stock of merchandise which the mortgage required the mortgagor to keep good by purchases made from the receipts of his sales, did not invalidate the mortgage as to creditors. The full discussion of the general subject contained in the opinion in that case renders any special reference to the authorities at this time unnecessary. The opinion recognizes the force of the contention that a mortgage is vitiated by a provision which permits the mortgagor to sell the entire property in a single transaction for his own benefit, but considers that a different question is presented by a permission to make sales in the usual course of business from a stock of goods which the mortgagor is required by the terms of the mortgage to keep up, for the reason that in such a case the power of sale is limited by the stipulation to maintain the stock. It will be noticed that the further discussion is with reference to sales which are supposed to be for the benefit of the mortgagee, however unreservedly the business may be left in the hands of the mortgagor. We fail to find any intimation in the opinion that a mortgage can be held valid which authorizes the mortgagor to sell the entire property at pleasure for his own benefit.

We think it must be regarded as beyond question that a provision in a chattel mortgage which places the mortgaged property at the absolute disposal of the mortgagor will invalidate the mortgage as to creditors. And it has been repeatedly held that a stipulation which will invalidate a mortgage if incorporated in it will have the same effect upon its validity if otherwise agreed to at the time the mortgage is given. It being the sole purpose of a mortgage to furnish security, a conveyance in mortgage cannot take effect as against creditors when there is a contemporaneous agreement that the mortgagor may still treat the property as if no mortgage had been given.

We think it would be equally inconsistent with the nature of a mortgage to hold that it can continue to exist as against creditors in connection with such an agreement subsequently made. It would seem that an agreement which, if made in connection with the giving of the mortgage, would prevent its taking effect, ought, if afterwards made, to put an end to it. Upon the subsequent making of such an agreement the mortgage becomes what it would have been at its inception had the agreement been contemporaneous. We see no reason why creditors should not be permitted to treat such an agreement subsequently made as an abandonment of the security—a practical discharge.

We find this position is not without the support of authority. In *Barnet v. Fergus*, 51 Ill. 352; 99 Am. Dec. 547, the question was in regard to the validity of a chattel mortgage which was valid on its face and at its inception. It was held that the holder of such a mortgage might lose his right to enforce it by subsequent acts, and that he would lose it if he permitted the mortgagor to hold the property for sale. It was considered that this was a necessary consequence of the doctrine held by that court, that a mortgage which authorizes the mortgagor to sell the property in the usual course of trade is void as to creditors.

The defendant also relies upon the existence of a mortgage of earlier date than the one above considered, which covered a part of the property subsequently mortgaged, including the colt in controversy. After the sheriff's sale, the second mortgagee, whose understanding with the mortgagor in regard to his own mortgage has already been stated, paid the holder of this prior mortgage the amount then secured by it. We think this payment of the first mortgage gave the second mortgagee no better right than he had by virtue of his own mortgage, and consequently can be of no avail to the defendant. As we have seen, the second mortgagee's arrangement with the mortgagor was in effect a discharge of his mortgage as regards creditors. This terminated his interest in the colt as against the levying creditor; and, having no longer that interest to protect by a payment of the first mortgage, his payment of the mortgage was as to the creditor that of a volunteer, and gave him no right to have it kept on foot to defeat the levy.. It is clear that the defendant cannot avoid payment on account of the first mortgage by asserting a right of subrogation in the second mortgagee.

Judgment reversed and judgment for plaintiff.

STATE v. ABNER CRAM.

MAY TERM, 1895.

Joint trial. Declarations of one respondent. Respondent limited in supreme court to exceptions taken.

1. When two respondents are jointly tried, whatever is admissible against one may be received upon the trial of both under proper restrictions.
2. The respondent and one Bow were jointly tried for murder. Upon the trial the state offered in evidence the declarations of Bow. The respondent excepted upon the ground that they were not admissible as against him. *Held*, that he could not in supreme court raise the question whether they were admissible as against Bow.

Indictment for murder against the respondent and James Bow. Plea, not guilty. The respondents were tried jointly at the September term, Orleans county, 1894, TYLER, J., presiding. Bow was acquitted and the respondent found guilty of manslaughter. The respondent excepts.

The state offered in evidence the declarations of Bow, made after the alleged killing and not in the presence of the respondent. The respondent objected for that they were not admissible as against him. The evidence was admitted as against Bow, and the jury were instructed that they must consider it only as against him. To the admission of this evidence as above the respondent excepted.

H. F. Graham and John W. Redmond for the respondent.

The declarations of Bow were not admissible against the respondent. Being admitted, they had their effect upon the minds of the jury which the charge of the court could not remove. *State v. Meader*, 54 Vt. 127; *Stirling v. Stirling*, 41 Vt. 80; *Wood v. Willard*, 36 Vt. 82; *Hodge v. Bennington*, 43 Vt. 450; 1 Thomp., Jury Trials, s. 687.

O. S. Annis, state's attorney, and *W. W. Miles* for the state.

The exception of the respondent was that the declarations were inadmissible as to him, and he cannot now insist that they were inadmissible as to Bow. 1 Bish., Cr. Prac., s. 959; *State v. Stoughton et al*, 51 Vt. 362; *State v. Meaker*, 54 Vt. 112; *United States v. Marchant & Colson*, 12 Wheat. 480.

The evidence was admissible, and it was the duty of the court to receive it, and properly limit its use by instruction to the jury. 1 Greenl., Ev., ss. 170, 171; *Reed v. Rice*, 25 Vt. 171; *Rooney v. Minor*, 56 Vt. 527; *State v. Mahon*, 32 Vt. 491.

MUNSON, J. The respondent Cram and James Bow were jointly indicted for murder. Neither asked for a separate trial, and the two were tried together. Whatever was admissible against one was admissible on the trial of both, under proper restrictions as to its effect. This included evidence of any statements of Bow which had a legitimate tendency to incriminate him, even though of a character prejudicial to Cram. *State v. Fuller*, 39 Vt. 74.

But it is insisted that some parts of the statements shown to have been made by Bow were not admissible as against him, and were for that reason improperly in the case. The exception taken does not permit a consideration of this question. The position of one respondent in relation to the conduct and admissions of the other first came up in connection

with an offer of the state to show the movements and sayings of the respondent Cram. This was objected to on behalf of the respondent Bow, and a discussion was had in regard to the admissibility of evidence of this character. At the close of this discussion the court announced that evidence of the admissions and acts of one respondent would be received as bearing upon the guilt of that respondent, and that it would be treated as received subject to the exception of the other respondent. When evidence of the same character was offered in regard to the respondent Bow, it was asked in behalf of the respondent Cram if the previous ruling and exception applied, and the court stated that they did. No objection was made other than that indicated. The court was nowhere called upon to make any distinction subordinate to the general ruling above stated. The exception taken was on the ground that the admissions of Bow were not evidence against Cram, and so should not be received. No exception was taken to the proof of any statement on the ground that it was not evidence against Bow, and should be excluded for that reason. So the question whether all the statements shown to have been made by Bow were receivable as admissions is not before us and is not considered.

It is not necessary to consider whether the exceptions inserted after thirty days, and provisionally allowed, are before us; for all the questions raised in regard to them are presented by the original bill.

Judgment that there is no error in the proceedings of the county court, and that respondent take nothing by his exceptions.

Rowell, J., absent in county court.

I. E. AND I. M. BRIDGEMAN

v.

VILLAGE OF HARDWICK.

MAY TERM, 1895.

Damages recoverable for the taking of water. Interest.

1. The owner of a farm adjacent to a village may recover as damages for the taking of the water of a brook running through the same not merely what it is worth for farm purposes, but also in view of the fact that the land is available for building lots and the water for supplying buildings which may be erected thereon.
2. Where commissioners appointed by the county court to assess damages report that the petitioners "are entitled" to a sum named, it will be presumed that they included interest to the first day of the term to which their report is returned.

Appeal from the award of the trustees of the village of Hardwick of damages for the taking of the water of the petitioners. Heard upon the report of commissioners at the June term, 1894, Caledonia county, MUNSON, J., presiding. Judgment for the smallest sum named in the petition. The petitioners except.

Bates & May for the petitioners.

The owner is entitled to damages in view of all the uses to which the water can be put, whether he is actually putting it to that use or not. *Maynard v. Northampton*, 157

Mass. 218; *Currie v. Rd. Co.*, 52 N. J. L. 381; *Stafford v. Providence*, 10 R. I. 567.

The damages to the whole farm must be considered; not merely those to the parts adjacent. *Currie v. Railroad Co.*, 19 Am. St. Rep. 452; 6 Am. & Eng. Ency. Law 574; *San Antonia Rd. v. McGregor*, (Texas) 22 S. W. Rep. 269; *Seattle Railroad v. Murphine*, 4 Wash. St. R. 448; *Chicago Railroad v. Davidson*, 49 Kan. 589; *Maynard v. Northampton*, 157 Mass. 218; *Krerner v. Railroad*, (Minn.) 52 N. W. 977; *Boon Co. v. Petterson*, 98 U. S. 403; *Railroad Co. v. Murphy*, 19 Minn. 500; *Barre Water Co. v. Carnes*, 65 Vt. 626; *Alta Land & Water Co. v. Hancock*, 85 Cal. 219; *St. Ant. W. P. Co. v. Minneapolis*, 41 Minn. 270.

The petitioners should have interest from the date of the taking. Acts of 1892, No. 121, s. 6; *Stafford v. Providence*, 14 Am. Rep. 710; *Fox v. Rd. Co.*, 31 Cal. 556; *Railroad Co. v. McComb*, 60 Me. 290; *Fink v. Newark*, 40 N. J. L. 11; *Railroad Co. v. Waldron*, 11 Minn. 515.

Taylor & Dutton for the petitionees.

The owner of this farm could divert only so much of the water as was necessary for his own domestic purposes, and can only recover damages on that basis. *Howe Scale Co. v. Terry et al.*, 47 Vt. 122; *Chatfield v. Wilson*, 31 Vt. 358; *Davis v. Fullers*, 12 Vt. 178; *Howard v. Rutland*, 64 Vt. 41; *Leonard v. Rutland*, 66 Vt. 105; Gould on Waters, ss. 204, 205, 208, 245; *Cooper v. Williams*, 22 Am. Dec. 745; *Delling v. Murray*, 63 Am. Dec. 385; *Eddy v. Simpson*, 58 Am. Dec. 408; *Kidd v. Laird*, 76 Am. Dec. 472; *Rhodes v. Whitehead*, 84 Am. Dec. 631; *Johns v. Stevens*, 3 Vt. 308; *Norton v. Valentine*, 14 Vt. 239; *Ford v. Whittemore*, 27 Vt. 265; *Newhall v. Iner-son*, 54 Am. Dec. 790.

THOMPSON, J. I. This is an appeal from the award of one cent damages to the petitioners by the trustees of the village of Hardwick for water taken by the village under authority granted in its charter, for domestic, sanitary, fire and other purposes. The petitioners appealed, and this proceeding was for a reassessment of their damages by the county court.

They are the owners of a farm of about one hundred acres lying northerly and westerly of the village of Hardwick, and adjoining the same. Quite a large portion of the southerly part of their farm, adjacent to the village, is suitable and quite valuable for building purposes, and they have surveyed and plotted into building lots quite a portion of land adjacent to the village and offered the same for sale. Eaton brook flows through their farm for the distance of nearly three-fourths of a mile. It is the water of that stream that the defendant has condemned and taken, diverting it from its natural channel at a point above where it enters the petitioners' farm. The building lots plotted and offered for sale are not adjacent to nor bordering upon the brook, but the land bordering upon it is suitable for building purposes. The petitioners have never utilized the water for any other than farming purposes.

The defendant claims that their right of recovery is limited to three hundred dollars, which the commissioners find to be the amount of the petitioners' damage by reason of being deprived of the water for domestic purposes and such benefits as might result to their land for the purpose of irrigation.

As we construe the original and supplementary reports, taken together, the commissioners make the alternative finding that, if the petitioners had the right to sell building lots not abutting on the brook and to supply buildings erected thereon with water from the brook, or to sell the right to take water therefrom for domestic purposes to supply the

buildings which might be erected on such lots, they are entitled to recover eight hundred dollars damages, which sum includes the three hundred dollars already mentioned. The petitioners insist that, on the facts reported, they are entitled to recover the larger sum. These are the only claims in respect to damages now urged by either party, except as to interest.

The petitioners' right of recovery is not limited to the damages resulting from being deprived of the use of the water for the legitimate uses to which they had put it prior to the taking by the defendant. They are entitled to recover such a sum as will compensate them for the loss of the use of the water for all available purposes to which they legitimately might have put it, or might have permitted it to be put, at the time of the taking. *Baxter v. Rutland*, 67 Vt. 607, decided this term; *Hooker v. Montpelier & White River R. R. Co.*, 62 Vt. 47; *Leonard v. Rutland*, 66 Vt. 105; *Bailey v. Woburn*, 126 Mass. 416. The mere plotting of the building lots in anticipation of an opportunity to sell them did not sever them from the residue of the farm, but they were still an integral part of it, and the entire farm still continued to be riparian to the stream. *Alta Land & Water Co. v. Hancock*, 85 Cal. 218; 20 Am. St. R. 217.

In *Barre Water Co. v. Carnes et al.*, 65 Vt. 626, this court said:

"A riparian owner may conduct water by means of pipes to any part of his premises, where he thinks it will be most convenient and advantageous to him, and may use the part so diverted for the same purposes and to the same extent that he could if it flowed through a natural channel. *Chatfield v. Wilson*, 31 Vt. 358; *Wheatley v. Chrisman*, 24 Pa. St. 298. Dwellers in towns and villages watered by a stream may use the water for domestic purpose to the same extent that a riparian owner can, provided they can reach the stream by a public highway or secure a right of way over the lands of others. * * * They can drive their

cattle to the stream and allow them to quench their thirst, and can carry water in pails to their houses; or each individual can carry the water in a pipe to his dwelling for such use, provided he can secure a right of way for that purpose."

The petitioners, with each lot sold which does not abut on the stream, can sell a right of way thereto over their land. Residents of buildings erected on lots thus sold, would be dwellers of a town or village within the meaning of the law laid down in *Barre Water Co. v. Carnes*, *supra*, and as such, having lawful access to the stream, could take water for domestic purposes, if it were not all taken by the defendant. Thus, if the water had not been taken by the defendant, the petitioners could in effect have sold the right to take water to supply for domestic purposes the buildings erected on lots not abutting the stream, for with the right of way the occupant could thus take the water, and without it he could not.

II. The plaintiffs claim to recover interest from the date of the taking of the water by the defendant, on whichever sum found by the commissioners, this court holds they are entitled to recover. They are entitled to interest on such damages from the time of the taking. No exception was taken to the commissioners' report on the ground that they did not consider and allow interest in arriving at their findings in respect to the amount of damages. Each of their alternative findings is in the present tense "the plaintiffs are entitled to recover," referring to the first day of the term of court to which they made and returned their report. The original report was recommitted on other questions. The case standing thus, we think it is to be presumed that they included interest in arriving at the damages reported.

Judgment reversed and judgment for the plaintiffs to recover eight hundred dollars, with interest from June 5, 1894, and their costs.

CHARLES I. SMITH, ADMR. OF ISAAC M.
SMITH'S ESTATE,

v.

ROBERT BLAIR, SECOND, APT.

MAY TERM, 1895.

*Tax collector. Administrator may prosecute suit begun by.
Quadrennial appraisal. Failure to file copy.*

1. The administrator of a tax collector may enter and prosecute to final judgment a suit begun by such collector in his lifetime for the collection of a tax by trustee process under R. L., ss. 407 and 408.
2. As the law stood in 1886, the neglect of the listers to file in the town clerk's office on or before September 15 a copy of the quadrennial appraisal, as required by R. L., s. 308, did not vitiate subsequent grand lists based upon that appraisal.

Suit for the collection of taxes. Heard upon the report of a referee at the December term, 1894, Caledonia county, MUNSON, J., presiding. Judgment for the plaintiff. The defendant excepts.

C. H. Hosford for the defendant.

The statute provides a method in case of the decease of a tax collector, and that method is exclusive. R. L., ss. 428-431; *Johnson v. Howard*, 41 Vt. 122; *Camden v. Allen*, 26 N. J. L. 398; *Crapo v. Stetson*, 8 Met. 394.

W. P. Stafford for the plaintiff.

The administrator is a proper party, The suit was that of the collector, and survived under the statute applicable to actions in assumpsit. R. L., s. 407; *Wheeler v. Wilson*, 57 Vt. 157; R. L., 2133, 2135, 2143.

The requirement that the listers shall file a copy of the quadrennial appraisal is directory merely, and a failure to comply with it does not vitiate the grand list. *Willard v. Pike*, 59 Vt. 202.

THOMPSON, J. I. During the years 1890 and 1891, the defendant was a resident taxpayer of the town of Barnet, and neglected and refused to pay the taxes assessed against him in that town. He did not have known personal property in this state sufficient to pay such taxes.

The plaintiff's intestate, Isaac M. Smith, was the duly elected and qualified constable and collector of Barnet for both of those years. Under the provisions of R. L., ss. 407 and 408, he, in his lifetime, commenced a trustee suit in his own name against the defendant to collect these taxes. While it was pending, he died, and his administrator entered to prosecute. The chief contention now is over the question whether the suit can be prosecuted to final judgment by the administrator. The defendant insists that R. L., ss. 428, 429, 430, designate the only remedy for the collection of a tax in the hands of a collector at the time of his death, and that consequently the right to maintain this action was terminated by the death of the plaintiff's intestate. These sections, in substance, provide that when a collector dies while a tax bill committed to him is uncollected, in whole or in part, his executor or administrator shall, on demand, lodge with the clerk of the town, village or other community, such tax bill and the moneys collected and not paid over as required by law, and that an executor or administrator who neglects this duty shall be liable to the town, village or other com-

munity, for the whole amount of the tax bill, and shall have no authority to collect or receive such unpaid taxes ; and that the successor of the deceased tax collector shall receive from the clerk the tax bill and money, if any, and shall complete the collection of the taxes as though the tax bill had been originally committed to him. These sections, as well as R. L., ss. 407, 408, are a part of R. L., Ch. 26, entitled, "Collection of Taxes," and are to be construed, together with the rest of that chapter, so as to give effect to all its provisions, if it can be fairly done. R. L., ss. 428-430, are intended to provide a speedy and effective way by which the town, village or other community, may recover possession of its tax bills in case of the death of its collector, but it was not intended by their provisions to deprive such collector or his representative of any rights specifically conferred upon the collector by R. L., Ch. 26. When the delinquent taxpayer has not known personal property in the state sufficient to pay the tax against him, R. L., ss. 407, 408, give the collector the right to commence, in his own name, a trustee suit upon such tax against such delinquent. When the conditions exist authorizing the collection of a tax in this way, a cause of action accrues to the collector, individually, by force of the statute. He sues in his own name, as an individual, and not in his official capacity as collector. He may join counts for causes of action accruing to him against the defendant for matters other than the taxes. The action must be assumpsit. *Wheeler v. Wilson*, 57 Vt. 157. It is the collector's duty to resort to all lawful means to collect the taxes committed to him. If he proceeds by trustee suit and recovers judgment against the taxpayer, he recovers his fees and legal costs. If judgment is rendered for the defendant in such a suit by reason of the illegality of the tax, the collector, by virtue of R. L., s. 450, is entitled to be indemnified by the town, village or other community, by which he is appointed, for the damage which he suffers by

the illegality of such tax. If the action is defeated by the death of the collector, not only his own costs, but those of the defendant, are cast upon his estate, for the town is not bound to indemnify him or his estate if the taxes are legal, but only in case they are illegal, and for that reason judgment is rendered against the collector. The validity of the taxes can only be determined by final judgment. We do not think it was the purpose of the statute to impose upon the collector the duty of collecting the taxes by trustee suit, if necessary, and at the same time mulct his estate with all the costs of the suit in the event he should die before final judgment. The legislature never contemplated so absurd and unjust a result. R. L., s. 407, expressly provides that after the commencement of such suit, "the same proceedings shall be thereupon had and the trustee shall be chargeable as in other trustee suits," except that the suit may be maintained although the tax is less than ten dollars and the trustee has less than ten dollars in his hands. In *Wheeler v. Wilson*, 57 Vt. 157, this court held that the statute, by prescribing the trustee process, impliedly prescribed that the form of the action should be assumpsit. It is equally clear that by prescribing that the same proceedings should be had as in other trustee suits, it impliedly declared that in the case of the death of the plaintiff, the suit might be prosecuted to final judgment by his administrator. This intention is still more clear, in view of the fact already suggested, that the action is given to the collector in his own name, individually, and not in his official capacity as collector. We therefore hold that when a collector has commenced a trustee suit to collect a tax, under s. 407, and dies during its pendency, his administrator may enter and prosecute it to final judgment, although the tax bill after his death may have passed into the hands of his successor. In this way the legality or illegality of the tax can be determined, and the right of the deceased collector to his costs or indemnity

be preserved. The taxpayer suffers no legal or moral injury by this construction of the statute. If the tax is adjudged to be illegal, he prevails and recovers his costs; if adjudged to be legal, he is made to perform his legal and moral duty as citizen.

II. No copy of the list of the quadrennial appraisal of real estate for 1886 was filed in the town clerk's office in September of that year, as required by R. L., s. 308. The defendant claims that this omission invalidates the annual lists for 1890 and 1891, and that the taxes assessed thereon are illegal. No question is made but that the quadrennial list was properly signed, sworn to and returned to the town clerk's office on before the first Tuesday of July of that year, as required by law. The list thus filed was the appraisal from which the taxpayer could appeal within three days from the first Tuesday of July, to the civil board, if he was dissatisfied with the appraisal of the listers. If no appeals were taken, the list filed would be the completed list. If appeals were taken, and sustained, the list filed by the listers would then and there be corrected, and thus corrected would be the quadrennial appraisal. It does not appear that any appeals were taken from the action of the listers.

St. 1882, No. 1, s. 41, repealed ss. 299 to 307, inclusive, of R. L., and thus abolished county equalizing conventions and the state equalizing board, and the provision that the listers should meet on or before the third Tuesday of July and revise such list and elect one of their number a member of the county equalizing convention. By St. 1882, No. 1, s. 33, R. L. 308 was amended by striking out the words, "by state equalizing board." As amended, this section reads as follows:

"Sec. 308. On or before the fifteenth day of September, in the year of the appraisal, the listers in each town shall make out, in blank books to be provided by the secretary of state, and deposit in the town clerk's office, for the use of

their successors in office, a fair copy of the the list of real estate in such town, embracing the following particulars:

"I. The name of each person assessed for real estate in such town.

"II. The real estate assessed to such person, specifying each parcel thereof, the class to which it belongs, the valuation of each parcel as finally established, and the village, school and fire district in which each parcel is situated."

It will be observed that the listers are only to make a copy of the list which has already been completed, and that such copy is for the use of their successors in office, and not for the benefit of the individual taxpayers. There are to be no deductions nor additions, as was often the case before the county equalization convention and state equalization board were abolished. We think as the law stood in 1886, the failure of the listers to file such a copy on or before the fifteenth day of September did not invalidate the quadrennial appraisal of that year.

This disposes of all the questions urged by the defendant in argument.

Judgment affirmed.

ALBERT HARWOOD'S ADMX.

v.

BENNINGTON & RUTLAND RY. CO.

MAY TERM, 1895.

Cattle Guards. Contributory negligence. Evidence.

1. In an action against a railroad company for not maintaining a sufficient cattle guard, whereby the plaintiff's horse passed from the highway onto the track and was injured, it is no defence that the horse escaped from the control of the owner, who was lawfully leading it along the highway, through his neglect.
2. Evidence offered by the defendant that its cattle guard was like those in common use by other companies, which had proved sufficient, was properly excluded for the reason, if no other, that the offer did not propose to show that the others were used under similar circumstances.

Case for the killing of plaintiff's horse. Plea, the general issue. Trial by jury at the December term, 1895, Bennington county, ROWELL, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

Batchelder & Bates for the defendant.

If the horse escaped through the negligence of the one in charge, it was wrongfully upon the highway and no recovery can be had. *Maynard v. Rd. Co.*, 115 Mass. 458; *McDonnell v. Rd. Co.*, 115 Mass., 564; *Towne v. Rd.*

Co., 124 Mass. 101; *Jackson v. Rd. Co.*, 25 Vt. 150; *Morse v. Rd. Co.*, 27 Vt. 49; *Bemis v. Rd. Co.*, 42 Vt. 375.

C. H. Darling for the plaintiff.

The offer that similar cattle guards had proved sufficient was too narrow. *Waite v. Rd. Co.*, 61 Vt. 268; *Trow v. Rd. Co.*, 24 Vt. 487; *Congdon v. Howe Scale Co.*, 66 Vt. 255.

The plaintiff was not guilty of contributory neglect. *Congdon v. Rd Co.*, 56 Vt. 390; *Cressey v. Rd. Co.*, 59 N. H. 564; 47 Am. Rep. 227.

START, J. While the horse of the plaintiff's intestate was being led along a highway by one Houghton, in whose care it had been placed, it escaped and ran along the defendant's track and was there killed. The plaintiff claimed, and her testimony tended to show, that the defendant's fence and cattle guard, at the point where the horse escaped and went upon the defendant's track, were defective; and that the death of the horse was occasioned by the insufficiency of the fence and cattle guard. The defendant claimed that the negligence of Houghton in leading the horse along the highway in the manner its evidence tended to show contributed to the injury complained of. The court held that Houghton's negligent manner of leading the horse at the time it escaped did not affect the liability of the defendant, and instructed the jury that the defendant was liable if the cattle guard was defective and the horse was on the track by reason of such defect, even though it was negligence on the part of Houghton to lead the horse as he did, and his negligence contributed to the horse's getting upon the track.

This holding and instruction was correct. It was the duty of the defendant to maintain a cattle guard at the point where the horse escaped from the highway and went upon

the defendant's track, suitable and sufficient to prevent cattle, horses and other domestic animals from getting upon its track; and, if damage has been done by its agents or engines to cattle, horses or other domestic animals, it is liable, if such damage was occasioned by want of a cattle guard sufficient to prevent such animals from escaping from the highway and going upon its track.

R. L., s. 3407, makes it the duty of railroad corporations to construct and maintain cattle guards at all farm and road crossings sufficient to prevent cattle and other domestic animals from getting upon the railroad track. R. L., s. 3409, requires railroad corporations to construct and maintain sufficient fences on both sides of its road. R. L., s. 3412, provides that, until fences and cattle guards are made, the corporation and its agents shall be liable for the damage done by its agents or engines to horses, cattle and other animals, if occasioned by want of such fences or cattle guards; and that, after such fences and guards are made, the corporation shall not be liable for such damage unless negligently or wilfully done. This last section was construed in *Congdon v. C. V. R. R. Co.*, 56 Vt. 39, and it was there held that the duty to maintain fences in a legal condition is as clearly imposed as the duty to construct them. The duty imposed by this section in regard to maintaining cattle guards is the same as that imposed in respect to fences; and it was not only the duty of the defendant to construct a cattle guard at the point where the horse escaped from the highway and went upon its track, but it was its duty to maintain and keep the guard in a condition to prevent cattle and other domestic animals from getting upon its tracks at that point.

The statute having made it the duty of the defendant to maintain a cattle guard at the point where the horse escaped from the highway and went upon its track sufficient to prevent horses from getting upon its track, and declared that for its neglect to do so it should be liable for all damages

done by its agents and engines, if occasioned by such neglect, the question of whether Houghton was negligent in leading the horse along the highway in the manner he did was immaterial, and the court properly withheld the question from the consideration of the jury. There was no claim that the defendant was negligent in running its train. The claim was that the defendant had neglected to perform a duty imposed upon it by statute; and the plaintiff sought to recover by force of the statute imposing a liability upon the defendant for damage occasioned by such neglect. The court charged the jury that, if the horse was on the track by reason of the insufficiency of the fence and guard, or of the guard, at the point where the horse jumped upon the track, the defendant was liable. The jury found that the fence or guard was insufficient at the point where the horse went upon the track; and, under the instruction of the court, they must have found that the injury was caused by such insufficiency.

While the horse was being lawfully led along the highway by Houghton, it may have escaped from his control and gone at large upon the highway by reason of his negligence. But while so at large, it escaped from the highway and went upon the defendant's track by reason of the neglect of the defendant to perform a duty imposed upon it by statute; and the defendant is liable for the damage occasioned by such neglect by reason of the statute. The liability thus imposed is not a qualified one, dependent upon the care and prudence on the part of a person lawfully leading or driving a horse upon the highway; and the defendant is not excused from liability because the horse, while being led upon the highway, escaped from control through Houghton's negligence. The doctrine of contributory negligence has no application where the findings bring the case within the provisions of the statute. Such guards are intended for the protection and safety of cattle, horses or other domestic ani-

mals lawfully upon the highway. The question of contributory negligence in this class of cases is fully discussed in *Congdon v. C. V. R. R. Co.*, *supra*, and that case and the cases cited are sufficient authority for holding that the doctrine of contributory negligence does not apply in this case.

The court properly excluded the testimony offered by the defendant to show that its cattle guard at the time of the accident was of a pattern and size in common use, and that such guards had been sufficient to prevent animals from getting upon the railroad track. If evidence of this character is ever admissible, which we do not decide, the offer was too narrow, in that the defendant did not propose to show that the other cattle guards that had proved sufficient and served their purpose were similarly circumstanced. *Congdon v. Howe Scale Co.*, 69 Vt. 255.

Judgment affirmed.

Tyler, J., being engaged in county court, did not sit.

JOSEPH BROOKS v. ALFRED GUYER.

MAY TERM, 1895.

*Possession obtained by threats. Evidence. Presumption
against error.*

1. The defendant claimed title to the goods in suit under bill of sale from the plaintiff. The plaintiff denied the execution of the bill of sale, and insisted that the defendant had obtained possession of the goods by frightening him out of the state. *Held*, that the plaintiff was properly allowed to testify that just prior to the date of the bill of sale the defendant told him that unless he left the state he would be arrested.
2. Error will not be presumed.

Trover. Plea, the general issue. Trial by jury at the December term, 1894, Caledonia county, MUNSON, J., presiding. Verdict and judgment for the plaintiff. The defendant excepts.

Alexander Dunnell for the defendant.

Bates & May for the plaintiff.

START, J. The defendant conceded that he took and sold the goods in question, but claimed that he acquired title to them by purchase from the plaintiff, and put in evidence a bill of sale purporting to be signed by the plaintiff. The plaintiff denied the sale and the execution of the bill of sale, and claimed that, just prior to the date of the bill of

sale, the defendant frightened and induced him to leave the state by falsely stating to him that he was about to be arrested for the crime of bigamy; and that these statements were made for the purpose of getting the goods in question into his possession. In support of this claim, the plaintiff was allowed to testify that the defendant told him if he did not leave town he would be arrested; that the sheriff was after him. The evidence was properly received in support of the plaintiff's claim. If the claim made by the plaintiff was established by the evidence, it tended to account for the defendant's possession of the goods and make the plaintiff's claim that he had not sold them more probable.

It is claimed that there was error in the charge of the court in respect to certain letters. We have not been furnished with copies of the letters and do not know their contents. The letters may have tended to establish the plaintiff's claim. We cannot, for the purpose of finding error in the charge, presume that they did not.

Judgment affirmed.

SOPHRONIA A. WILMOT

v.

WARREN LATHROP AND MARIA HURLBURT.

SAME

v.

MARIA L. HURLBURT AND MARY P. BENTON.

JANUARY TERM, 1895.

Taxation. Quadrennial appraisal. Time of filing and taking oath by listers may be shown by parol. To whom real estate should be set. Tax bill need not be certified by selectmen. Error in computation. Partition. When co-tenant has lien on entire property.

1. The true date when the listers were sworn and deposited the quadrennial appraisal in the town clerk's office may be shown by parol, although there is attached to the appraisal, as deposited, a certificate that the oath was administered on a day later than that within which the list should have been completed and filed.
2. *Quere*, whether this would be so if the taxpayer, relying upon the date attached to the appraisal, had lost the right of appeal.
3. No record of the preliminary oath of the listers need be made by the town clerk.

4. Real estate, conveyed by deed by the terms of which the grantor reserves the use and possession, is properly set in the grand list to the grantor as the owner thereof.
5. A mere error in computation will not invalidate a grand list nor a particular tax.
6. *Held*, that it sufficiently appeared from the town records that the tax had been voted under the proper article in the warning.
7. A tax bill delivered to the treasurer in accordance with s. 1, No. 90, Acts 1880, need not be certified by the selectmen, and what it is may be shown by parol.
8. In tax proceedings, only those defects insisted upon by the excepting party in the court below, as shown by the record, will be considered in the supreme court.
9. A part owner of real estate, who redeems it from a tax sale, has a lien upon the entire property for the amount so advanced, and his co-tenants cannot maintain a petition for partition until they have paid him their proportion of the same.

These two cases were heard together by court at the June term, 1894, Orange county, Ross, C. J., presiding. The first was ejectment, in which the plea was not guilty; and the second a petition for partition. Upon the facts found, the court gave judgment in the ejectment suit for the defendant, Maria L. Hurlburt, to recover her costs, to which the plaintiff excepted. In the other suit, the court ordered partition, to which the defendant, Maria L. Hurlburt, excepted. The facts appear in the opinion.

Geo. L. Stowe and R. M. Harvey for plaintiff.

Parol evidence was not admissible to contradict the record as to the time when the quadrennial appraisal was filed or the preliminary oath administered to the listers. *Houghton v. Hall*, 47 Vt. 333; *Ayres v. Moulton*, 51 Vt. 115.

The purchasing in of the tax sale by one co-tenant enured to the benefit of all. *Dubois v. Campau*, 24 Mich. 360; *Battin v. Woods*, 27 W. Va. 58; *Sorenson v. Davis*,

83 Ia. 405; 49 N. W. Rep. 1004; *Lamax v. Gindele*, 117 Ill. 527.

Darling & Darling and *J. H. Watson* for Maria L. Hurlburt.

The true date of a record may be shown when that is material. *Hopkins v. School Dist.*, 27 Vt. 281; *Carpenter v. Sawyer & Jewett*, 17 Vt. 121; *Chandler v. Spear*, 22 Vt. 388, 401; *Bartlett and wife v. Boyd*, 34 Vt. 262; *Day v. Peasley*, 54 Vt. 312; *Hayes v. Hanson*, 12 N. H. 284; *Jackson v. Young*, 5 Cow. 269; *Williams v. Lunenburg*, 21 Pick. 82; *Sprague v. Bailey*, 19 Pick. 436; *Johnson's Admr. v. McGuire*, 4 Vt. 327; *Johnson v. Burden et al.*, 40 Vt. 567.

Mere clerical errors do not vitiate a list when there is no intentional fraud. *Spear v. Braintree*, 24 Vt. 414; *Nilson v. Wheeler*, 55 Vt. 446; *Brock v. Bruce*, 58 Vt. 261.

It is not necessary that a rate-bill should be certified by the selectmen. *Brown v. Hutchinson*, 11 Vt. 574; *Chandler v. Spear*, 22 Vt. 388.

An objection to records and official lists must be pointed out in the court below, or it will not be considered in supreme court. *Hills v. Marlboro*, 40 Vt. 648; *Wing v. Hall*, 47 Vt. 182.

When a co-tenant is obliged to redeem land from a tax sale, he is entitled to hold the whole property until his co-tenants pay him their proportionate shares. 1 Wash. R. P. (2d. Ed.), 619, 624; *Cuyler et al. v. Ensworth*, 6 Paige Ch. 32; *Calkins v. Steinbach*, 66 Cal. 117; *Freeman on Co-ten. and P.*, s. 263; *Sheldon on Sub. ss.* 9, 14; *Whittaker v. Wright*, 35 Ark. 511; *Pratt v. Pratt*, 96 Ill. 184; *Johnson v. Payne*, 11 Neb. 269; *Fiacre v. Chapman*, 32 N. J. Eq. 463; *Watkins v. Eaton*, 30 Me. 529; *Davidson v. Wallace*, 53 Miss. 475; *Harrison v. Harrison*, 56 Miss.

174; *LaForge v. Herter*, 111 Barb. 159, 164; *Aiken v. Gole*, 37 N. H. 501; *Fletcher v. Chase*, 16 N. H. 42.

In order to obtain partition, the petitioner must have possession or the immediate right to possession of the lands. *Baldwin v. Aldrich*, 34 Vt. 526; *Nichols v. Nichols*, 28 Vt. 228.

MUNSON, J. The two cases to be determined were tried together. The first is ejectment for a lot known as the Smith Hill pasture. The second is a petition for the partition of premises known as the Hiram Lathrop home farm. The Smith Hill pasture adjoins the Lathrop farm, and has long been used in connection with it. Both pieces were set to Hiram Lathrop as one parcel in the list of 1886, and were sold for the non-payment of taxes assessed under a vote taken at a special town meeting held in February, 1887. Maria L. Hurlburt, a defendant in both suits, claims under this sale.

In 1863, Hiram Lathrop conveyed the home farm to Elias Lathrop, who, on the same day, conveyed it to Daniel W. Lathrop and the two persons now made defendants in the partition suit. The deed executed by Hiram Lathrop contains this clause: "It being further conditioned, agreed and understood between said parties that the said Hiram Lathrop is to live on the above described premises and is to have the control and benefit of said farm and premises during his natural life." In 1882, Hiram Lathrop conveyed the Smith Hill pasture to the same Daniel W. Lathrop, with the following reservation: "And the said Hiram Lathrop reserves a life lease on the above-named land, and the use of the same as long as he shall live." The respective titles were as above shown at the time the lists in question were taken. The plaintiff has obtained the interest of Daniel W. Lathrop in both pieces.

The grand list of 1886 is based upon the quadrennial ap-

praisal of 1882. The law required the listers to return this appraisal to the town clerk's office on or before the first Tuesday in July. R. L., 292. The preliminary oaths of the listers, as entered in this appraisal, are dated and certified to have been taken on the eighteenth day of July. The court below has found from parol evidence, excepted to by the plaintiff, that these entries are erroneous, that the listers were sworn before commencing this appraisal, and that the appraisal was seasonably returned to the town clerk's office. Both the true time of administering the oath and the seasonable return of the appraisal could be established by parol. The rule which permits a contradiction of the date of a paper by other proof of the time of its execution has been often applied to official documents; and, in the case of official certificates, to the time when the official act is certified to have been done. *Morton v. Edwin*, 19 Vt. 77; *Chandler v. Spear*, 22 Vt. 388 (401); *Hopkins v. School District*, 27 Vt. 281; *Bartlett v. Boyd*, 34 Vt. 256; *Johnson v. Burden*, 40 Vt. 567. The statute does not require that the time the appraisal is deposited shall appear from the appraisal itself, and it may be established by the testimony of any one cognizant of the fact. *Blodgett v. Holbrook*, 39 Vt. 336.

The law required that this appraisal be returned with a certificate of its correctness thereto attached, verified by oath. R. L., 296. This certificate and verification also bear the date of July eighteenth. The finding of the court below does not expressly include these in the list of dates found to be erroneous, but no claim is made regarding them except that they afford conclusive proof that the appraisal was not completed and filed within the time required. It is distinctly said in argument that if the appraisal was in fact filed within the required time, it was filed in the form in which it now appears. It having been found from evidence held to have been admissible that the ap-

praisal was seasonably filed, it must be taken to have been filed with the proper certificates incorrectly dated. It is argued in this connection that the purpose for which the appraisal is required to be deposited at this time entitles the taxpayer to rely upon it as made, and that the position in which he would be placed by changes based upon parol evidence is a sufficient reason for holding such evidence inadmissible. It is said that one who finds in his individual list ample cause for taking an appeal, may decide not to do so because of the manifest invalidity of the entire appraisal. The case before us affords no basis for this argument, whatever the weight to which it might otherwise be entitled. An appeal must be taken within three days after the first Tuesday. R. L., 297. One inspecting this appraisal within the time available for an appeal would have found the required certificate with an impossible date. This clearly would not have justified him in treating the list as invalid. If the time allowed for taking an appeal had extended beyond the eighteenth, so that an inspection might have been had after the date of the oath and yet within the time allowed for an appeal, the argument would have required further consideration.

It is also urged that no record of the preliminary oath taken by the listers was made by the town clerk. This was not essential to the validity of the appraisal. *Day v. Peasley*, 54 Vt. 310.

It is claimed that the sale was invalid because the property was set to Hiram Lathrop instead of the persons to whom he had conveyed as above stated. When the quadrennial appraisal of 1882 was made, the statute required that real estate be set to the owner. R. L., 276. When the list of 1886 was taken, it might be set to the owner or possessor. No. 7, Acts 1884. But the assessment is good, even if it be assumed that its validity depends upon the property having been set to the owner in the quadrennial valuation. The

language before quoted from Hiram Lathrop's deeds was sufficient to secure to the grantor a life estate in the premises conveyed. No particular form of words is necessary to create an estate for life. A reservation of the use and control of the granted premises during life is sufficient. *Richardson v. York*, 14 Me. 216. It is the duty of one holding such an estate to pay all the taxes assessed upon the land during his life. 1 Wash. Real Prop. 96. We think one holding a freehold estate which carries with it an obligation to pay the taxes is an owner to whom the land may properly be set.

The case submitted presents no findings on which the sale can be held invalid on the ground of an error in determining the amount of the Lathrop list after equalization. An ordinary error of computation, in no way chargeable to bad faith, will not invalidate either the list or the particular tax. *Spear v. Braintree*, 24 Vt. 414.

It is further claimed that the assessment of the tax was unauthorized. Article second in the warning reads as follows: "To see if the town will vote to raise money to apply on the indebtedness of the town and current expenses, and what amount of money they will raise, and when it shall be collected." The record of the proceedings contains the following: "A motion made and carried that the town raises \$6.00 on the dollar on the grand list of 1886, and raised on the spring list." On the margin opposite the record of this action is the entry: "Article second in the warning." We think it sufficiently appears that under this article in the warning the town voted to raise a tax of six hundred cents on the dollar of the grand list for the purpose stated in the warning.

The tax bill offered in evidence as the one delivered to the treasurer was not certified to by the selectmen. It purports to be the special tax of 1887 assessed on the grand list of 1886; and the court found from parol evidence, to the

admission of which exception was taken, that that tax was placed in the treasurer's hands for collection. It is provided by s. 1, No. 90, Acts of 1880 (R. L., 382-388), that the selectmen shall make and deliver to the treasurer all tax bills then required by law to be made and verified by them, except highway tax bills. The law did not then require that any tax bills made out by the selectmen should be verified by their certificate. G. S., ch. 15, ss. 46, 47. It had been held upon an examination of these provisions that a certificate of the selectmen was unnecessary, and that parol evidence might always be received to show on what list and under what vote a particular tax was assessed. *Reed v. Jamaica*, 40 Vt. 629. There having been, at the time the act of 1880 was passed, no requirement that a tax bill be certified, it cannot be claimed that that act impliedly required that the tax bill delivered to the treasurer should be certified. Nor has the general provision in regard to the duties of the selectmen in this respect been changed by the revision. R. L., 2693.

It appears from the case that the plaintiff claimed on trial that there were various irregularities in the proceedings of the town treasurer and collector in collecting the tax and making this sale, and that these appear in the records and papers referred to. Two or three irregularities in these proceedings are now claimed, but there is nothing to show that these were among the points raised in the court below. It is evident that in a case which involves the regularity of a series of official documents and records, justice requires that the excepting party be confined to those defects which are shown to have been specifically pointed out in the county court. It is said in *Dana v. Lull*, 21 Vt. 383, that this court will consider only the questions which are shown by the record to have been raised and passed upon in the court below. When counsel concluded to urge these defects they

should have procured an amendment of the exceptions showing that they were pointed out on the trial.

We hold that the tax sale was valid, and that the judgment given the defendants in the ejectment suit was correct.

Judgment affirmed.

The interest of Hiram Lathrop in these premises was determined by his death in 1891. The property thereupon became subject to partition among the common owners. But the petition brought to effect this is contested by the defendant Maria L. Hurlburt, upon a claim based on the tax sale. After the sale, and before the time for redemption had expired, Mrs. Hurlburt made an arrangement with the purchasers by which she obtained a deed of the property upon payment of the amount for which it was sold. She does not claim that by this proceeding she acquired any title to the shares owned by her co-tenants. But she insists that a disbursement of this character entitles her to hold possession of the entire property until she has been paid the sums properly chargeable to the other interests, and that a petition for partition cannot be sustained against her until such payment has been made.

It is well understood that a co-tenant who redeems the common property from a mortgage incumbrance may hold it under the mortgage until the other owners pay him their proportionate shares of the money advanced. *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402. We think a remedy not less efficacious should be accorded one who redeems common property from a tax sale. Such a sale fixes an incumbrance upon the land as effectually as the delivery of a mortgage deed. The tenure by which the purchaser holds the land during the time allowed for redemption is essentially the same as that of a mortgagee. The situation of a co-tenant is the same under one form of incumbrance as

under the other. He cannot effect a release of his own interest without redeeming those of his co-tenants. It seems reasonable to hold that an enforced payment of this character by one tenant in common gives him a lien upon the shares of his co-tenants to secure his advances, with a right to retain possession until payment is made. It was so held in *Watkins v. Eaton*, 30 Me. 529; 50 Am. Dec. 637. See also *Hurley v. Hurley*, 148 Mass. 444. And while this right of possession exists there can be no partition at the suit of the other co-tenants; for partition can be had only by one who is in possession or is entitled to immediate possession.

We hold that the petitioner has failed to establish her right to partition, and that the judgment that partition be made was erroneous.

Judgment reversed and petition dismissed.

WILLIAM O. CLARK v. FRANK PAQUETTE.

JANUARY TERM, 1895.

*Mortgagee in possession. Liability for rents.
Right of way.*

1. A mortgagee in possession, who buys in the equity of redemption, is liable for rents upon redemption by a subsequent mortgagee.
2. If the owner of two mortgages forecloses them both in one petition and occupies the premises under the decree obtained, he is liable for rents as to one having an interest between his two mortgages and not made a party to his foreclosure proceedings.
3. And the right to the application of rents is the same although the interest is only a right of way across the premises.

Petition of foreclosure. Heard upon the pleadings and a master's report at the September term, 1894, Franklin county. ROWELL, chancellor, held that the orator account for the rents and profits and decreed accordingly. The orator appeals.

In 1884 George Blaisdell and others mortgaged the premises in question to one Post. This mortgage was foreclosed at the April term, Franklin county, 1889, and the decree then entered became absolute.

In 1886 the same parties mortgaged the premises to one Clark. April 30, 1888, they executed another mortgage of the same premises to the same Clark. These mortgages were foreclosed at the September term of the Franklin County Court, 1890. The decree obtained in that suit be-

came absolute June 1, 1891, and the petitioner Clark then took possession of the premises and continued in the possession thereof down to the time of the hearing before the master in this case.

April 13, 1888, the said Blaisdell and others conveyed to the defendant Paquette a right of way across the premises three feet in width, and this deed was duly recorded before the execution of the last mortgage to Clark. Paquette was not made a party to the foreclosure proceedings by Clark against the Blaisdells.

Clark was made a party to the petition for the foreclosure of the Post mortgage, he being at that time a subsequent mortgagee, and after that decree became absolute he purchased and took an assignment of the same. In the foreclosure proceedings subsequently brought by him against the Blaisdells, the fact of the purchase and assignment of this decree to him were set forth.

The orator insisted that he ought not to account for the rents which he had derived from the premises after taking possession under his decree. The master found that such profits amounted to the sum of three hundred eighty-seven dollars and sixty-two cents, and the chancellor decreed that the orator should account therefor.

Farrington & Post for the orator.

H. C. Adams for the defendant.

If a person holding the first mortgage buys in the equity of redemption, he must account for rents and profits to a subsequent mortgagee. *Gibson v. Gahore*, 5 Pick. 140, 158; *Gladding v. Warner*, 36 Vt. 54.

MUNSON, J. We are called upon to determine whether the rents and profits received by the orator should be applied in reduction of the incumbrances from which the

defendant is to redeem the property. When this case was before us upon bill and answer it was remanded with a mandate which permitted the defendant to redeem by paying the amount of the first and second mortgages. 66 Vt. 386. It is clear that the amount contemplated by the mandate was the amount which might be found due upon such an accounting as the defendant was entitled to. If the defendant is equitably entitled to have the rents and profits applied in reduction of the mortgages, he is not precluded therefrom by the form of the mandate.

The orator took possession of the property at the expiration of the time allowed for redemption under the second decree. This decree covered both the second and third mortgages, one of which was prior and one subsequent to the defendant's deed. If the orator's possession is to be treated as that of a purchaser of the equity by virtue of his foreclosure of the third mortgage, he is not liable to account to the defendant for the rents and profits. But if his possession is to be treated as that of a mortgagee by reason of his rights under the second mortgage, then the defendant is entitled to the benefit of the rents and profits, as the grantee of an interest in the equity which remained in the mortgage after the second mortgage was executed.

When one who is already in possession as mortgagee purchases the equity of redemption, he is held to continue in possession as mortgagee notwithstanding his purchase, and to be accountable to a subsequent mortgagee for the rents and profits of his entire occupancy. 2 Jones, Mort., s. 1118; *Harrison v. Wise*, 24 Conn. 1; 63 Am. Dec. 151. This case differs from the one cited, in that the orator, at the time he took possession, had become the owner of the equity by his foreclosure of the third mortgage, which was the last conveyance made by the mortgagor. But inasmuch as the orator blended the second and third mortgages in one foreclosure, and entered for the non-payment of a decree

which embraced both, we think his possession must be referred, in determining the rights of the defendant, to the second mortgage.

It is further insisted that, inasmuch as the defendant has no other interest in the premises than a right of way across them, he ought not to be allowed the earnings of the property in aid of a redemption. But no satisfactory ground is suggested on which it can be held that the nature of the defendant's interest takes the case out of the general rule governing the rents and profits of redeemable premises. It is said that a mortgagee in possession must account for the rents and profits upon a redemption of the premises by any one interested in them. 2 Jones. Mort., s. 1114. There is nothing in the character of a mortgagee's possession that suggests the possibility of an exception. He is treated as a bailiff of the mortgagor, and necessarily sustains the same relation to one who holds an interest in the equity by a title derived from the mortgagor.

Decree affirmed and cause remanded.

Ross, C. J., dissenting.

OSCAR D. OLCOTT, ADMR., v. FRED C. DAVIS.

MAY TERM, 1895.

Insolvency. Sale of mortgaged property. Interest. Application of payments. Mortgage. Decree.

*Presumption as to payment of debt
by taking possession.*

1. A sale by an assignee in insolvency, under order of court, of mortgaged property, without notice to the mortgagee, cannot affect the rights of such mortgagee under the mortgage.
2. Where, upon a note payable with interest annually, a payment is made before the interest falls due which is sufficient to pay the interest then due and a portion of the principal, but which is not specifically applied, the maker of the note has the right to have the computation carried forward to the end of the year, and the amount applied in payment of the interest then falling due.
3. If the maker of a note secured by real estate mortgage gives a chattel mortgage to secure the payment of the interest, he thereby separates the interest from the principal, and the holder of the real estate mortgage may take a decree for the amount of the principal without interest.
4. Such a decree gave the petitioner interest on the amount of the decree from its date, and upon default the petitioner took possession of the mortgaged premises. *Held*, that the real estate should be applied to the payment of the principal first, and that the mortgagor must show that the value of the premises was sufficient to pay both principal and interest at the time of default, or the mortgagee could recover the interest under his chattel mortgage.

Trover. Plea, the general issue. Heard upon the report of a referee at the September term, 1893, Windham

county, TAFT, J., presiding. Judgment for the plaintiff for the larger sum named in the report, and costs. The defendant excepts.

The payment of July 19, 1892, referred to in the opinion, was eight hundred dollars. It was endorsed upon the note, and the referee did not find that any application was made of it by either party. He did report that a computation was then made by the parties, showing due on the note as of that date, after deducting this payment, four thousand two hundred seventeen dollars and ten cents, but that the amount actually due was four thousand two hundred seventeen dollars and sixty-five cents.

The sale of the mortgaged property was under order of the court of insolvency, based upon the petition of the assignee, and was a general order to sell all the real and personal estate of the insolvent.

F. C. Davis, pro sc.

Interest is created by statute, and can only be computed in the manner authorized. *Ill. Ct. R. Co. v. Cobb*, 72 Ill. 148; *Pekin v. Reynold*, 31 Ill. 529; *Chicago v. Allcock*, 86 Ill. 385; R. L., s. 1998.

Annual interest is only payable at the end of the year. *Walton, Admr., v. Hall's Est.*, 66 Vt. 464; *Catlin v. Lyman et al.*, 16 Vt. 44.

L. M. Reed for the plaintiff.

MUNSON, J. On the fifteenth day of November, 1882, George L. Cutler executed to the plaintiff's intestate a mortgage of certain real estate, to secure the payment of four thousand two hundred and ninety-four dollars, with interest annually at five per cent., as specified in his promissory note of that date. In October, 1887, Cutler executed to the same party a chattel mortgage, which was conditioned, among

other things, for the payment of the interest then due and to become due on the note above described. In October, 1892, Cutler was adjudged an insolvent debtor, and the defendant was appointed assignee of his estate. Soon after his appointment, the defendant procured a general order for the sale of all the debtor's real and personal estate, and in the month of November he sold the real and personal property covered by the above mortgages, as if it were unincumbered. Both the order and the sale were without notice to the plaintiff.

At the December term in 1892, the plaintiff brought a petition to foreclose the real estate mortgage, and obtained a decree thereon dated January 13, 1893. The decree was taken for the principal of the note only, with interest on the amount of the decree from its date to the time of payment. A default in payment occurred April 1, 1893, and the plaintiff took possession of the premises on the 8th of April. In the same month, the plaintiff placed the chattel mortgage in the hands of an officer for foreclosure, and the officer thereupon demanded of the defendant the unpaid interest on the note described in the real estate mortgage, or a delivery of the mortgaged chattels. Neither demand being complied with, this suit in trover was brought.

The statute provides that the assignee of an insolvent debtor may require the sale of property upon which a creditor has a mortgage, and that it shall be sold under the order of the court and in such manner as the judge shall direct. R. L., 1802; *International Trust Co. v. West Rutland Marble Co.*, 63 Vt. 326. A sale under this provision is a disposition of property upon which the creditor has a valid mortgage notwithstanding the adjudication of insolvency, and from which he is to receive full payment, if the net proceeds of the sale are sufficient. If a sale is to be had, the manner of the sale is an open question, to be determined by the judge in making the order. This is a matter upon which

the mortgagee has a right to be heard, and notice to him is therefore essential to the validity of the order. There having been no notice in this case, the plaintiff is not affected by the sale.

The plaintiff's claim is for the unpaid interest on the mortgage note above described. It appears that the last payment upon the note was made July 19, 1892, and that this was sufficient to pay the interest to that date and reduce the principal to four thousand two hundred seventeen dollars and sixty five cents. The plaintiff claims that the interest unpaid is the interest on the above sum from July 19, 1892, to April 2, 1893, the day he became entitled to possession. The defendant contends that in determining the amount of unpaid interest, the computation must be carried to November 15, 1892, the end of the current year, counting from the date of the note.

The chattel mortgage merely gave the creditor additional security for interest due and to become due on the note described in the real estate mortgage. It had no effect by way of a modification of the previous contract, and did not authorize an irregular rest in computing the interest. The finding that at the time of making the last payment, July 19, 1892, a computation was made showing the balance then due, is not sufficient to establish a new principal. The defendant is entitled to have the interest determined upon the basis of a computation carried to November 15, 1892.

The giving of this chattel mortgage was in effect an agreement that the interest might be treated as a separate demand for the purpose of realizing upon the different securities. The plaintiff was therefore entitled to take a decree for the principal of the debt, leaving the interest to be collected by means of the chattel mortgage. But he took a decree, not only for the principal, but for the interest to accrue upon the amount of the decree from its date to the time of payment. The defendant claims that the plaintiff, by taking

his decree in this form and afterwards taking possession of the premises, has precluded himself from recovering interest after the date of the decree.

The decree and the taking of possession under it did not operate as a payment of the debt beyond the value of the property. The value of the property is not reported. The burden was upon the defendant to show the extent of the payment. *Emerson v. Washburn*, 8 Vt. 9. It might perhaps be safe to assume that the property was sufficient to satisfy the interest, if first applied to that part of the decree. But if this would ordinarily be the application, it is not the proper application in the circumstances of this case. The creditor having only the security of the land for the principal of the debt, and a further security for the interest, the land will first be applied in satisfaction of the principal. Upon this order of application, there being nothing to show how much of the indebtedness was satisfied, the interest must be treated as unpaid.

No interest having been obtained by way of the decree, the plaintiff is entitled to recover here the interest which accrued on the balance of unpaid principal from November 15, 1892, to April 2, 1893, the day he became entitled to possession. Nothing is claimed beyond this.

Judgment reversed and judgment for plaintiff for the second sum reported.

STATE v. J. B. DYER ET ALS.

OCTOBER TERM, 1894.

Conspiracy. Punishable at common law. Prosecution by information. Evidence. Uncertainty in pleading. Joint trial. Ground of exception must be stated in trial court.

1. A combination of two or more persons to constrain an employer to discharge a particular workman by threatening to prevent his obtaining other workmen, or to constrain a workman to join a certain organization by threatening to prevent him from obtaining work unless he does so is a criminal conspiracy at common law.
2. Such offence is a misdemeanor, and the prosecution may be, therefore, by information.
3. R. L., s. 4365, providing that where an offence is punishable by imprisonment it shall be in the house of correction unless specified to be in the state prison, applies to penalties inflicted by the common law.
4. *Held*, that the counts in this information were not bad for uncertainty.
5. *Held*, that a conversation between two of the respondents and a third person which took place on the Sunday next after the week during which the acts complained of were committed, was properly received, first, because it connected these respondents with the crime, and second, because it was so near the acts in point of time as to be virtually concomitant with them.
6. Upon the joint trial of several respondents, the admissions of one may be received under proper instructions to the jury that they are evidence against him alone.
7. If a respondent relies upon a misnomer to sustain a motion for a verdict, he should point out that ground in the trial court or it will not be considered in the supreme court.

8. The evidence tended to show a conspiracy to compel one McClure to join the Granite Cutters' National Union or quit work, and that in consequence McClure had stopped work. The respondents were all members of this association and in what they did acted as such. *Held*, that the evidence warranted the conviction of Dyer, who was the secretary of the association, although no act of his was shown in connection with the matter until after McClure had actually stopped work.

Information in two counts. Plea, not guilty. Trial by jury at the September term, Washington county, MUNSON, J., presiding. Verdict, guilty. Judgment on verdict. The respondents except.

The material part of the information was as follows:
First count:

"That Josiah B. Dyer and Thomas Quinlan of Barre, in the county of Washington, and Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank of Montpelier, in the county of Washington, with divers evil disposed persons, to the state's attorney unknown, on the 22d day of November, in the year of our Lord one thousand eight hundred and eighty-nine, at Montpelier, in the county of Washington, did unlawfully combine, conspire, confederate and agree together to prevent, hinder and deter, by violence, threats and intimidation, one Jacob McClure, then and there being a stone cutter by trade and occupation, in the employment of the Wetmore & Morse Granite Company of Montpelier, aforesaid, a corporation then and there being and existing by law, from obtaining work or employment, or continuing in his said work and employment, at his said trade or occupation, in the said shops of the said Wetmore & Morse Granite Company of Montpelier aforesaid, or in any other shops or works for the cutting or manufacture of granite work, with the malicious and unlawful intent, of them the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hockin and Alex. Cruickshank, by said violence, threats and intimidation, to prevent the said Jacob McClure from obtaining work or employment at his said trade and occupation in the shops and works of the said

Wetmore & Morse Granite Company of Montpelier aforesaid, or in any other shops or works for the cutting or manufacture of granite work."

Second count :

"That Josiah B. Dyer, Thomas Quinlan, of Barre, in the county of Washington, and Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank of Montpelier, in the county of Washington, on the 22d day of November, in the year of our Lord one thousand eight hundred and eighty nine, at Montpelier, in the county of Washington, being granite cutters by occupation, not being content to allow other granite cutters to pursue their avocations and employment, wherever they wished, and on whatever terms might be agreed upon between said other granite cutters and their employers, but contriving and unjustly and unlawfully intending to destroy the effect of free competition in the price and value of labor, to coerce and constrain said other granite cutters, and to compel said other granite cutters to join and become members of a branch of the National Stone Cutters' Union, an organization then and there organized and existing, at Montpelier aforesaid, and to prevent said other granite cutters from obtaining work at their said trade and occupation, did on the 22d day of November, A. D. 1889, at Montpelier aforesaid, with force and arms, combine, conspire, confederate and unlawfully agree together, and did enter into an organization and compact, whereby it was, among other things, provided that no person or persons not members of the said branch of the said stone cutters' union should be allowed to work in the shops of the Wetmore & Morse Granite Company of Montpelier aforesaid, or in any other shop or works for the cutting of granite, or manufacturing of granite work. And the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank in the pursuance of the said unlawful conspiracy, combination and compact, with the intent by violence, threats and intimidation to prevent one Jacob McClure then and there being a stone cutter by trade and occupation, *from obtaining or continuing work* at his occupation of granite cutting, in the said shops or works of the said Wetmore & Morse Granite Company of Montpelier

aforesaid, or in any other shops or works for the cutting of granite, did then and there threaten and say to Jacob McClure, who was then and there a laborer and workman as a granite cutter, in the shops and works of the said Wetmore & Morse Granite Company of Montpelier aforesaid, that if he, the said Jacob McClure, did not join and become a member of a branch of the National Stone Cutters' Union, then and there organized and existing at said Montpelier, that they, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, and others unknown to the state's attorney, would organize a strike against the said Jacob McClure, in the shops and works of the said Wetmore & Morse Granite Company of Montpelier aforesaid, and would prevent him, the said Jacob McClure, from obtaining work at his said trade of stone cutting in said shops of the said Wetmore & Morse Granite Company of Montpelier aforesaid, or in any other shops or works where granite cutting or manufacturing was carried on. And the said Jacob McClure refusing then and there to become a member of the said branch of the National Stone Cutters' Union, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, did then and there threaten and say, to the said Wetmore & Morse Granite Company of Montpelier aforesaid, that unless the said Jacob McClure was turned away from his employment as a granite cutter, in the said shops and works of the said Wetmore & Morse Granite Company of Montpelier aforesaid, they, the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, would organize a strike against the said Jacob McClure and would prevent the said Wetmore & Morse Granite Company of Montpelier aforesaid from obtaining or employing any workmen or laborers in their said shops or works. And by means of said sayings and threats the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, did then and there affright, drive away and prevent the said Jacob McClure from obtaining and con-

tinuing his employment and labor in the said shops or works of the said Wetmore & Morse Granite Company of Montpelier aforesaid. And so the said state's attorney, on his oath aforesaid, says, that the said Josiah B. Dyer, Thomas Quinlan, Frank Morrill, Patrick Morrison, Peter Hernon, E. D. Sherburne, H. P. Sylvester, Thomas Hocking and Alex. Cruickshank, did then and there, in manner aforesaid, by threats, intimidation and the unlawful and grievous conspiracy aforesaid, carried into execution as aforesaid, prevent the said Jacob McClure from obtaining and prosecuting his said employment and work of stone cutting in the said shops and works of the said Wetmore & Morse Granite Company of Montpelier aforesaid, or in any other shop or works for the manufacture or cutting of granite."

The other points decided sufficiently appear in the opinion.

Dillingham, Huse & Howland, Z. S. Stanton, John H. Senter, and W. A. Lord for the respondents.

The proceeding could not be by information since the crime might be punishable by imprisonment in the state prison for more than seven years. Wright & Carson's Law of Crim. Conspiracies and Agreements, pp. 18, 97, 222; 1 Bish., Crim. Pro., s. 1150; *State v. Danforth*, 3 Conn. 112; *State v. Wilson*, 2 Root 69.

The motion for a verdict in favor of the respondent, Dyer, ought to have been granted. The evidence did not show that he was connected, directly or indirectly, with the acts complained of until after the crime had been committed. *Commonwealth v. McGowan*, 2 Pars. Select Cases, 314; *Reg. v. Gompertz*, 92 Q. B. 824.

The counts were defective for the reason that they charged the crime in the alternative. *Rex v. Robe*, 2 Strange 984-992; *Dary v. Baker*, 4 Burrow 2471; Ex. Parte Pain, 5 Barn. & Cress. 251; *Commonwealth v. Grey*, 2 Grey 501.

J. P. Lamson for the state.

Where the crime is one at common law and the conclusion is both against the form of the statute and the peace of the state, the former will be rejected as surplusage. *Davis v. State*, 3 Har. and Johns. 154; *Page v. Harwood*, Allyen 41; *King v. Dickinson*, 1 Saund. 135a; 1 Bish., Crim. Proc., 349; *Knowles v. State*, 3 Day 103; *Southwick v. State*, 5 Conn. 325; *Rex v. Journeymen Tailors*, 8 Mod. 10; *State v. Miller*, 24 Conn. 519; *Rawson v. State*, 19 Conn. 292.

TYLER, J. I. It is contended that the information is insufficient. Neither count is under Section 4226, R. L. That section provides that, "A person who threatens violence or injury to another person with intent to prevent his employment in a mill, manufactory, shop, quarry," etc., shall be punished, etc. It evidently is not directed to cases where two or more persons act in concert, as in sections 4236 and 4237. Nor is either count under section 4227, which is directed against persons who, by threats, intimidation or force, drive men from their employment with intent to prevent the prosecution of work in such mill, etc. The second count avers that the respondents threatened the Wetmore & Morse Granite Co. that they would prevent its obtaining workmen if it did not discharge McClure, but does not aver that the threats were made with such an intent as is necessary to bring the case within section 4227.

Conspiracy is an offence at common law. Bishop says it is connected with every form of wrong-doing cognizable by the law; that it is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or an end. The unlawful act must either be such as would be indictable performed by one alone; or, not being such, be of a nature particularly adapted to injure the public, or some individual, by reason of the combination.

2 Crim. Proced., s. 166; 2 Crim. Law, s. 171. Powers, J., said in *State v. Stewart et als.*, 59 Vt. 273:

“The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute; or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable; or promote objects or adopt means that are *per se* oppressive, immoral or wrongfully prejudicial to the rights of others”;

And cites, among other authorities, 2 Russ. on Crimes, “that all *conspiracies whatever*, wrongfully to prejudice a third person, are highly criminal at common law.” See notes to this case in 59 Am. R. 710; *The King v. Mawbury*, 6 T. R. 636.

The counts of this information are in substantial compliance with the common law precedents. 2 Crim. Proced. chap. 18. They are in all material respects like those in the indictment in *State v. Stewart et als.*, which were held sufficient as setting out a conspiracy at common law. Our statute, R. L., s. 689, adopts so much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to our constitution and laws.

The main question that arises upon this branch of the case is whether the prosecution could be by information or must be by indictment. The respondents' counsel argue that conspiracy can be charged only by indictment, as conviction thereof was followed at common law by *villainous judgment*.

The ancient punishment of conspiracy was that called villainous judgment, which was that the offenders should lose the freedom or franchise of the law, so that they should be disqualified as jurors or witnesses, and have their lands

and goods seized by the crown. 3 Chit. Crim. Law, 1144. But the author says there has been no instance of the infliction of this punishment since the time of Edward III., and that it was punishable like any other misdemeanor, at the discretion of the court. *Rex v. Spragg et al.*, 3 Burr. 997. In 2 Russ. on Crimes, 574, it is said that this kind of judgment had become obsolete, not having been pronounced for some ages. In 2 Bish. Crim Law, s. 240, conspiracy is declared to be a misdemeanor, even in those cases where its object is the commission of a felony.

R. L., s. 1618, provides that state's attorneys may prosecute by information all crimes except capital and those punishable by imprisonment in the state prison more than seven years. *State v. Haley*, 52 Vt. 476.

The first count charges a conspiracy to prevent McClure's obtaining employment; the second, the actual accomplishment of the purpose; both charge a conspiracy to do acts unlawful at common law by means unlawful under the statute. *State v. Stewart et als.*

In section 940, Bish. Crim. Law, it is said that the ordinary and appropriate common law punishment for a misdemeanor is fine and imprisonment, or either, in the discretion of the court; that it is inflicted in all cases in which the law has not provided some other specific penalty.

Section 4365, R. L., provides that where an offence is declared by law to be punishable by imprisonment, and it is not specified that such imprisonment shall be in the state prison, it shall be construed to mean that it shall be in the house of correction. The words, "declared by law," do not necessarily or reasonably mean statute law only, but include the common law whenever it defines an offence and makes it punishable by imprisonment. In this view, the claim that prosecution can only be by indictment is not maintained.

II. It is a general rule that the facts and circumstances

which constitute the crime must be stated with such certainty and precision that the accused may judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly; that he may determine the kind of offence they constitute and prepare his defence, and that the court may know what judgment to pronounce upon conviction. As Lord Kenyon said in *Rex v. Holland*, 5 T. R. 607, that the party accused may be apprised of the charge against which he is to defend himself; that the court may know what judgment shall be pronounced according to law, and that posterity may know what law is to be derived from the record.

It is elementary that an indictment, information or complaint must not charge the accused disjunctively, so as to leave it uncertain what is relied on as the accusation against him. Thus, an indictment which alleged that the defendant made a forcible entry into two closes of meadow *or* pasture, was held bad. *Spear's case*, 2 Rol. Abr. 81; so an information which alleged that the defendant sold beer *or* ale without an excise license, *The King v. North*, 6 Dowl. & Ryl. 143; and where one was charged with committing a certain nuisance *or* causing it to be committed, *Rex v. Stoughton*, 2 Stra. 900. In *Rex v. Stocker*, 1 Salk. 371, an indictment for forging *or* causing to be forged, etc., was held ill. But Lord Mansfield said in *Rex v. Middlehurst*, 1 Burr. 400:

“Upon *indictments*, it has been so determined, ‘That an *alternative* charge is *not* good (as ‘forged or caused to be forged’), though *one only* need be *proved*, if laid *conjunctively* (as ‘forged *and* caused to be forged’). But I do not see the reason of it; the substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect.”

A forcible illustration of a disjunctive charge is *Ex parte Pain*, 5 B. & C. 251, s. c. 11 Eng. C. L. 450. The indictment was under a statute which prohibited three kinds

of casks from being found attached to certain vessels in the Irish or British channels in certain circumstances; first, those of the kind used for smuggling spirits; second, those intended to be so used; third, those fit or adapted for that purpose. The allegation was that said vessel had attached twenty casks, * * * “of the sort and description *used or intended to be used* for the smuggling of spirits”; *held*, that it was not alleged that the casks answered any one of the three descriptions, but one or another of them, and that the allegation being in the alternative was defective.

Rex v. Morley, 1 Y. & J. 221, was under a statute which enacted that no foreign silks or velvets should be imported or brought into Great Britain, upon penalty, etc. The averment in the count upon which the trial was had was “that the defendant imported *or* caused to be imported,” etc. This was held bad for uncertainty. Several similar cases where the indictments were held ill are referred to in the opinion; as *Wingfeld v. Jaffery*, 1 Lord Raym. 284, “for selling live cattle *or* causing them to be sold”; *Attorney General v. Farr*, 4 Price 122, where the defendant was charged “with having been assisting or otherwise concerned in unshipping smuggled goods”; *King v. Stocker*, 5 Mod. 137, where the charge was “for making and fabricating, *or* causing to be made and fabricated, a bill of lading.” It was said by the court in that case that, “It is true, in a strict sense, that he who causeth a forgery to be done is a forger himself, but then it ought to be so laid in the indictment”; that one was the proper act of the party, the other not, and the circumstances might require a distinct consideration as to the fine. In *Davy v. Baker*, 4 Burr. 2471, the declaration was that the defendant received a gift *or* reward, and was held bad, it not stating of what the gift or reward consisted.

In all these cases there is uncertainty in respect to the act with which the respondents are charged. Generally the charge is in the alternative, as that the respondent did one

thing *or* another thing; or that he did a certain thing *or* procured it to be done.

In *Commonwealth v. Gray*, 2 Gray 501, the complaint was that the defendant, without license, etc., did sell spirituous *or* intoxicating liquor to one White; *held*, that as the complaint left it uncertain whether the defendant was charged with having sold spirituous liquor, or intoxicating liquor not spirituous, it was insufficient to sustain a judgment.

But where a person was charged with having in his possession ten counterfeit bank bills, *or* promissory notes, with intent, etc., the indictment was held sufficient upon the ground that "promissory note" was used merely as explanatory of "bank bill," and meant the same thing. *Brown v. Commonwealth*, 8 Mass. 59. In *State v. Gilbert*, 13 Vt. 647, an information was held sufficient which alleged that the defendant feloniously stole, took and carried away a mare of a bay *or* brown color, the court holding that it was unnecessary to describe the color and that the colors named were the same.

In this case, the material averments in the first count, that the respondents entered into a conspiracy together, that the conspiracy was against McClure, that the purpose was to be accomplished by threats, intimidation and violence, are single and definite. But it is contended that the averment that the conspiracy was to prevent McClure "from obtaining work or employment, *or* continuing in his said work and employment" is alternative and bad. As it is alleged that McClure was in the employment of that corporation when the conspiracy was formed, *obtaining* employment in its shops and *continuing* employment there are synonymous terms. The two words convey a conjunctive and not a disjunctive meaning. Any other signification than that the conspiracy was to prevent McClure from having employment in those shops would be forced and unnatural. With

the addition, "or in any other shops or works," etc., the charge is of a conspiracy to drive McClure out of his employment as a stonemason. The conspiracy is the gist of the offence here charged. *Commonwealth v. Judd*, 2 Mass. 337; *Commonwealth v. Shedd*, 7 Cush. 514; *People v. Mather*, 4 Wend. 259.

The same reasoning applies to the second count, which contains the further averments of threats to McClure to drive him out of employment unless he would join the respondents' branch of the Union; of threats to the corporation that unless it discharged him from its service they would prevent its obtaining any workmen, and that it did drive McClure out of the employment of the corporation. Both counts contain unnecessary words, but the material allegations are not uncertain. While the rule requires that every offence shall be laid with reasonable certainty—"certainty to a certain extent in general"—both counts apprised the respondents with sufficient certainty of the offence of which they were accused. Greater strictness than this "would tend to render the law nugatory and ineffectual, and destroy or evade the very end of it."

III. The respondents' counsel contend that the testimony of Eagan and McDonald was improperly admitted. It consisted of a conversation had between those witnesses and Dyer and Morrison, two of the respondents, on the Sunday next after the acts complained of. The evidence of the state had tended to show that the respondents had driven McClure from the employment of the Wetmore & Morse Granite Company, and that on Saturday of that week he engaged to do some granite carving for Eagan; that on Sunday Dyer, McDonald and Morrison were at Eagan's shop to inquire about the agreement between Eagan and McClure; that Eagan told Dyer and Morrison of the agreement he had made; that McClure had afterwards told him of the trouble he had had at the Wetmore & Morse shops; that he

had made inquiry and ascertained that there would be trouble if McClure undertook to cut stone for him, and that he had cancelled the agreement. Eagan then testified to a conversation that followed as to the reason why McClure had not joined the union, and why he had been forced into his then present position. This evidence could not have been excluded, as it tended to show that Dyer and Morrison were connected with the alleged offence. We also think that the conversation was so closely connected with the main occurrence that it was not a mere narrative of a past event. It was *concomitant* with the principal act, and so connected with it that it might be regarded as the result and consequence of the co-existing motives of all the respondents. 1 Greenl. Ev. s. 110.

The testimony of Hernon was only to the effect that at Eagan's request he made inquiry whether the retention of McClure by Eagan would make trouble, and that he reported to the latter the result, which was testified to by Eagan. It amounted merely to this, that Hernon was the means through which Eagan ascertained a certain fact. It was immaterial how Eagan ascertained the fact or whether he ascertained it at all, or whether he retained or dismissed McClure from his service. The point was that Dyer and Morrison were at Eagan's making inquiry about his employment of a non-union man, and in the same connection discussing the subject of McClure's dismissal from the Wetmore & Morse shops.

The state was entitled to the testimony of Deputy Sheriff Camp. It tended to show that while Morrison was under arrest he made certain admissions to the officer about his connection with the union, the office he held in it, and his action in respect to McClure. It is true that he claimed to have acted under the instruction of other respondents and that he was not in fault, but so far as his statements tended to inculcate himself they were admissible. So far as they tended to criminate others the jury were carefully instructed as follows :

“But the declarations of one of the respondents not made in the prosecution of the undertaking, but after its completion, are not evidence against the others. For instance, the testimony of the witness Camp as to what was said to him by Morrison, is to be considered only as affecting Morrison, and is not evidence against the others.”

This was a correct instruction in respect to the use they were to make of this evidence.

IV. At the conclusion of the testimony the respondents' counsel made the following motion: “We make a formal motion asking for a direction from the court, directing an acquittal of each one of the respondents upon the ground that there is no evidence to justify their conviction under either of the counts in the information,” which motion was overruled. It is now claimed that it should have been sustained on two grounds: First, that the real name of the organization to which the respondents belonged was the Granite Cutters' National Union, whereas it was called in the second count in the information the National Stone Cutters' Union; second, that there was no evidence tending to connect Dyer with a conspiracy against McClure, and that he should have been discharged.

The motion could not have been sustained on the first ground because it failed to call the attention of the court to the misnomer. The court was not bound to have knowledge of the name of the organization. It is well settled that a motion for a verdict should state the precise grounds on which it is based, or the court may well disregard it. *State v. Nulty*, 57 Vt. 543. The defect was not of substance and the variance was so immaterial that it might have been cured by amendment had the attention of the court been directed to it. It is first pointed out in this court, which is equivalent to filing the motion here.

The other question must be determined by the evidence. That introduced by the state tended to show the following facts: That there was an organization called the Granite Cut-

ters' National Union, with a branch in every place where any considerable number of granite cutters were at work; that there were branches at Barre and Montpelier. The organization had a constitution and by-laws, a president, secretary, and an executive committee which also had a secretary. The executive committee held meetings at regular times and kept a record of its doings. Each branch also had its officers, rules and regulations, and held meetings. All the respondents were members of the organization. McDonald was president, Dyer was secretary, one of the executive committee and its secretary, and his office in Barre, where a paper was published, was the headquarters of the organization. Morrison was an officer called a shop steward, whose duty was to keep a record of all non-union men on works where he was employed and present their names at the branch meeting. It was also his duty to notify every non-union man to report at such meeting and take the obligations. If he refused, action would be taken against him which would result in his becoming a member or being obliged to leave his employment. The person for whom the non-union man worked would also be notified and action be taken against him if he retained such a man in his service. Morrill, Morrison and Sherburne worked at the Wetmore & Morse Shops. They belonged to the Montpelier branch and attended its meetings, and Morrill sometimes presided. About Oct. 15, 1889, McClure, who was a granite cutter and non-union, went to work in the Wetmore & Morse shops, and continued to work there till Nov. 21st, boarding at the same place with Morrill and Sherburne. Morrison soon called on him and informed him that he should have to report him. McClure gave reasons for not joining. In about a week Morrison again called on him, told him he had laid his case before the meeting of the branch which had directed him to notify McClure that he must report at their hall at the next meeting, on Nov. 20th, and that if he failed to report he would make him trouble. McClure wrote a let-

ter for Morrison to read at the meeting in which he stated reasons for not joining, and offered to pay the same amount as if he were a member. On Nov. 21st Morrison notified McClure that his case had been considered at the meeting and that it had been unanimously voted "that he had got to join the Union that day at 12 o'clock," that Morrill, as president *pro tempore*, would administer the obligation or oath to him, and that if he failed to report, action would be taken against him and a strike organized against him. About eleven o'clock that day Morrison again called on him and gave him a final choice between taking the obligation or being driven from the works. On the same day Morrill and Sherburne told him in substance that he would have to join or quit work. There were other conversations between Morrison, Morrill, Sherburne and McClure to the effect that unless he joined they would take action against him; that they would strike and demand his discharge and they would not allow him to work.

McClure refused to join and on November 22 quitted his employment.

The state's evidence further tended to show that Morrison procured a meeting of the executive committee to be held at Barre on Saturday evening, Nov. 23rd; that it was held to investigate McClure's case; that Morrison made a statement of the trouble with the latter, of McClure's letter to the meeting, of the meeting held at noon of the 22nd at the shops, and that while it was in session word came that McClure "had packed up and gone"; that Dyer was present at this meeting and recorded its proceedings and he and McDonald were appointed to go to Montpelier the next day to investigate; that they went accordingly and had the interview with Eagan before referred to, also with the secretary of the Montpelier branch.

The evidence did not tend to show that Dyer made any threats to or had any communication with McClure, yet he was a prominent officer in an organization whose purpose was

to compel all stone cutters to become members or leave their employment. His presence as such officer at the meeting of Nov. 23rd, his acceptance of the appointment with McDonald to visit Montpelier the next day and "investigate," his visit on Sunday and interviews with Eagan, Rice and others, were acts following so closely upon the action taken against McClure on Friday that they were a part of the *res gestae* of the offence charged.

The motion in arrest on the ground of the insufficiency of the information has already been considered.

Judgment that there was no error in the proceedings of the county court, and that the respondents take nothing by their exceptions.

STATE v. MARK MEACHAM.

MAY TERM, 1895.

Information. Amendment of. Practice.

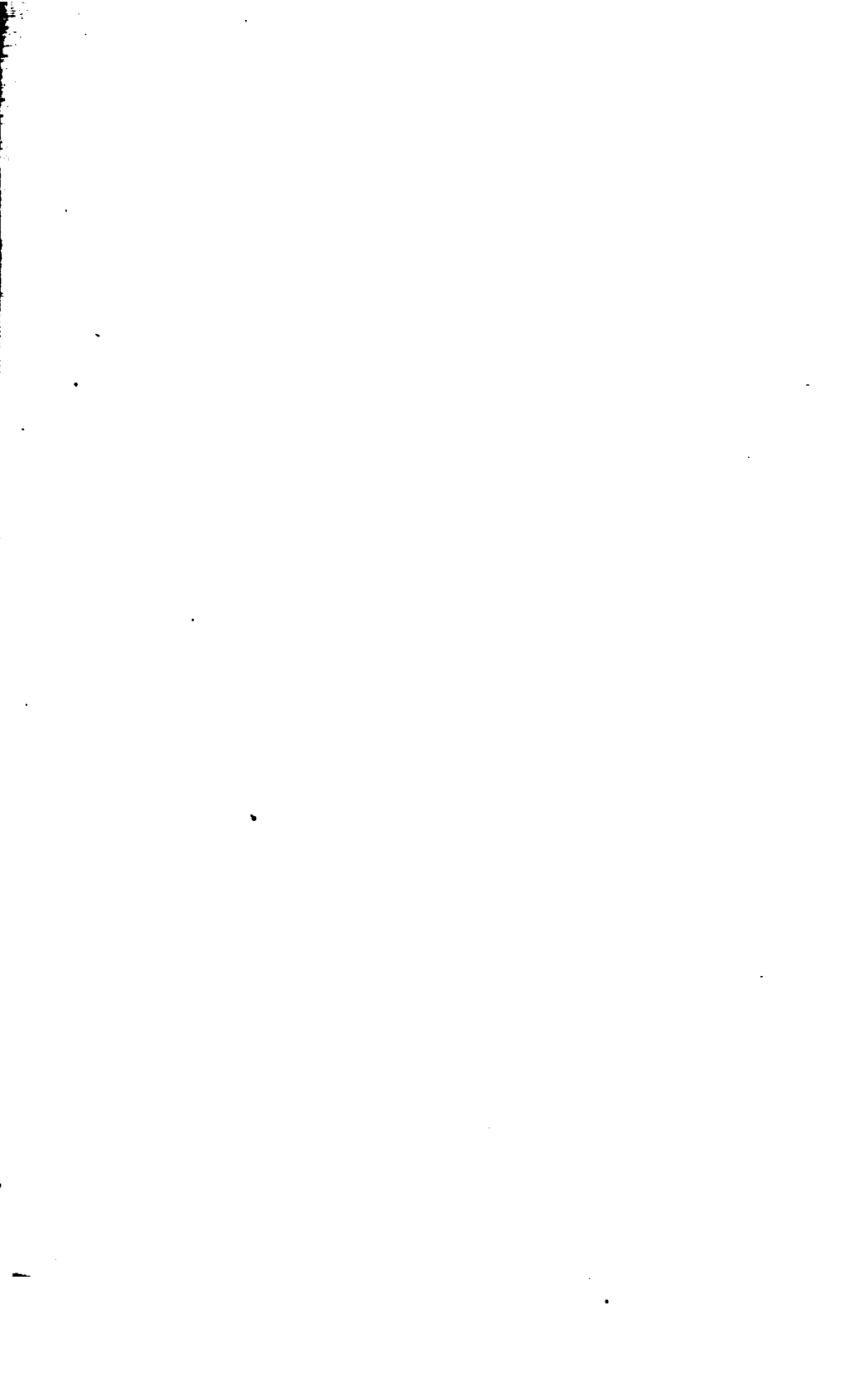
Since a state's attorney, or his successor in office, may amend an information in both form and substance, the supreme court, not being able to agree whether the information was sufficient, remanded it to the county court for further proceedings.

Information for keeping a dog without license. Heard upon general demurrer at the June term, 1894, Caledonia county, TYLER, J., presiding. Demurrer overruled. The respondent excepts.

Dunnett & Nelson for the respondent.

W. H. Taylor, state's attorney, for the state.

PER CURIAM. In this case the views of the judges who heard it were such that no decision could be made in regard to the sufficiency of the information. But, inasmuch as the information of the state's attorney can be amended, by his successor in office, even, both in form and in substance, the court *pro forma* reversed the judgment of the county court and remanded the case to be there proceeded with.



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ACCORD AND SATISFACTION.

There was no accord and satisfaction, for the order was not tendered in full payment. *Newton v. Waterford*, 372.

ACTION.

Since the defendant holds this fund as a trustee under the direction of the probate court, assumpsit will not lie against him for its recovery, certainly not until he has settled his account in that court and a decree has been made directing the payment to the proper persons. *Semmig v. Merrihew*, 38.

See PENAL STATUTE 1; EJECTMENT 1.

ACTION OF ACCOUNT. *See* EQUITY 7.

ACCOUNT.

An account stated as settled is not conclusive as to items not embraced in it. *Crampton v. Seymours*, 393.

ADJOINING LANDS. *See* LATERAL SUPPORT 1.

AGENT.

1. When the declarations of an agent are offered upon the main issue, the question whether he was in fact agent is a preliminary one for the court. *Dickerman v. Ins. Co.*, 609.

2. If in determining this question the court receives other than legal evidence, it is error. *Ib.*

3. The declarations of an agent that he is such, made without the knowledge of the principal, is not evidence tending to show an agency. *Ib.*

4. That one has the blank proofs of loss of an insurance company is not evidence tending to show him the agent of the company. *Ib.*

AGENT. *See* SCHOOLS 6, 7.

ADJUDICATION. *See* WILL 9.

- ADVERSE POSSESSION. See EVIDENCE 4, 5, 6, 7, 8, 9.
 ADVERSE PARTY. See CROSS EXAMINATION 1.
 ADVERSE USER. See EASEMENTS AND SERVITUDES, 2, 3.
 ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

AMENDMENT.

1. Where, in an action for trespass *quare clausum* brought in the name of the husband and wife, the declaration describes the premises as the property of the plaintiffs, the court may, upon trial, allow such an amendment as to show the title in the *femme* plaintiff. *Swerdferger and wife v. Hopkins*, 136.
 2. If the county court has the legal right to allow an amendment, the granting of the same is matter of discretion, and the action of the court in that respect cannot be revised here. *Ib.*
 3. As a rule, no amendment should be allowed upon final hearing which changes the substance of the bill. *Norton v. Parsons et al.*, 526.
- See PROBATE COURT 2; PRACTICE 7.

APPEAL.

1. The county court, upon appeals in insolvency, has the same powers that the court of insolvency had in the first instance. *Purdy v. Estate of Purdy*, 50.
2. The claimant, upon appealing from the probate court, filed his declaration in assumpsit in that court. Subsequently he filed two additional counts in case in the county court. The defendant moved to dismiss these counts, and the court denied the motion. *Held*, no error; for
 - (a) A party is not confined in the county court to his declaration filed in the probate court, but may file such additional counts as the nature of the claim demands; and
 - (b) It may be that the counts were filed under No. 73, acts of 1888, to cover claims not presented to the commissioners by reason of fraud, accident or mistake; and the court will not presume the contrary to find error. *Cutting v. Ellis' Est.*, 70.
3. Under s. 18, No. 28, Acts 1892, an appeal from the judgment of a justice must be entered within twenty-one days, and if

not so entered should be dismissed on motion. *Mack v. Lewis*, 383.

4. The failure to enter an appeal within that time is a defect which may be waived by the appellee. *Ib.*

5. If the appellee appears in the county court and omits to move to dismiss within the time allowed for the filing of dilatory pleas, that will amount to a waiver. *Ib.*

6. Where the entire amount which the plaintiff seeks to recover as damages for a breach of the defendant's contract is less than twenty dollars, the suit is not rendered appealable by the fact that that sum is arrived at by the apportionment between several delinquents, of which the defendant is one, of a larger sum, the contract with the defendant being several. *Crosby v. Enterprise Cheese Co.*, 638.

APPEAL. *See* PROBATE COURT 1.

APPLICATION OF PAYMENTS. *See* PAYMENT 2.

APPORTIONMENT OF COSTS. *See* COSTS.

ASSISTANT JUDGE. *See* COUNTY COURT 2.

ASSUMPSIT.

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ASSUMPSIT. *See* ACTION; LANDLORD AND TENANT 5, 6.

ATTACHMENT. *See* HOMESTEAD, 1, 2, 3.

ATTORNEY.

1. Where a committee of two, appointed to report the facts upon proceedings for disbarment, agree as to the facts but disagree as to the conclusion to be drawn from those facts, that aspect of the report most favorable to the attorney on trial will be adopted. *Re J. J. Enright*, 351.

2. It is cause for disbarment, if an attorney, who, as an executor, is a co-plaintiff in a suit, represents to the opposing attorney that he has knowledge of certain facts, which will be an absolute defence to the suit, and which he offers to impart for the payment of a sum of money, although such representations are false and were made to induce a settlement of the suit. *Ib.*

AUDITA QUERELA.

1. In general *audita querela* will not lie unless the judgment sought to be vacated was obtained by the fraud or misconduct of the other party. *Walter v. Foss*, 591.

2. Where, owing to a misunderstanding between the agent of the defendant and the plaintiff's attorney, but without any fraud upon the part of the attorney, the defendant failed to enter an appearance, *audita querela* will not lie. *Ib.*

AUTREFOIS ACQUIT. *See* FORMER ACQUITTAL 1.

BANK STOCK. *See* PLEADING 2, 3.

BOND OF TAX COLLECTOR. *See* TAXES 2, 3, 4.

BOOK ACCOUNT. *See* EQUITY 7; PROBATE COURT 4.

BURIAL GROUNDS. *See* WILL 4.

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1. *Roberts v. Hunt*, 61 Vt. 612, and *Smith v. Wood*, 63 Vt. 534, explained. *French v. Osmer*, 427.

2. *State v. Nixon*, 18 Vt. 70, criticised. *State v. Plant*, 454.

CATTLE. *See* FENCES 2.

CATTLE GUARDS. *See* RAILROAD COMPANIES 1.

CERTIFIED EXECUTION. *See* EXECUTION 1.

CHAMPERTY.

1. A champertous agreement is void and not enforceable in this state. *Hamilton v. Gray*, 233.

2. An agreement to receive and collect certain notes for one-half of what may be collected is champertous. *Ib.*

CHANGE OF POSSESSION. *See* LIEN.

CHARGE OF COURT.

1. Where, upon the facts, the prisoner is guilty upon both counts if upon either, it is no error for the court to tell the jury that if they find him guilty upon the first count they probably will upon the other. *State v. Gorham*, 365.

2. The court may assume as true in its charge facts which are conceded, and this includes facts which, although in dispute at first, have come to be conceded in the course of the trial. *Ib.*

3. The prisoner admitted that he made the confession, but said it was false. At the time he made it he had no knowledge of the evidence of the prosecution against him. The court instructed the jury that they might inquire whether the respondent would have been likely to concoct a story at that time which would have so exactly fitted the surrounding circumstances. *Held*, no error, it not appearing that the existence of the "surrounding circumstances" was in dispute. *Ib.*

4. The jury came in disagreed, but without asking for additional instruction. The court thereupon gave them an additional instruction, which was proper if they had been properly instructed upon that subject before. *Held*, no error. *Ib.*

5. *Held*, that what the court said about the expense of the trial, in returning the jury to a further consideration of the case, was intended to reconcile them to their duty, and not to promote an agreement, and therefore not error. *Ib.*

6. Where a party, by his requests to charge, suggests the use of a word, he cannot afterwards except to its use in the sense suggested. *Eastman v. Curtis et al.*, 432.

7. It was no error for the court to say to the jury that certain facts developed by the testimony were "significant." As said, it did not amount to the expression of an opinion. *State v. Young*, 450.

8. Where the whole charge is referred to in the bill of exceptions, the court will look into those parts not set forth in words in the exceptions for the purpose of ascertaining whether those so set forth are elsewhere qualified or explained. *State v. Bradley*, 465.

9. Where the prisoner and deceased were alone together in a room at the time of the homicide, the jury were properly told that, in determining the degree of murder they should consider what happened in the room when the deceased was killed, as far as that could be fairly inferred from the sounds and conversation testified to, if they believed that testimony to be true. *Ib.*

CHARGE. *See* EXCEPTIONS 2.

CHATTEL MORTGAGE,

1. A description in a chattel mortgage may be good as be-

tween the parties, and entirely insufficient as to third parties. *First Natl. Bank v. Fitts*, 57.

2. The description "all growing grass on my home place, except sufficient for ten tons of hay; all growing crops, except what the law exempts on said home farm," is good as between the parties. *Ib.*

3. The mortgage is not void because no provision is made for separating the exempt from the non-exempt. *Ib.*

4. A chattel mortgage of "two two-year-old heifers and three one-year-old heifers," with nothing more, is void for indefiniteness as against the vendee of the mortgagor, although it appear on trial that, at the date of the mortgage, the mortgagor owned the property described, and does not appear that he owned any other of the same kind. *Huse v. Estabrooks*, 223.

5. A mortgagee who takes possession of personal property under a chattel mortgage, valid between the parties, but invalid as to third persons, will hold it as against one who claims under bill of sale taken after notice in fact of the mortgage to secure an existing debt. *Sherman v. Estey Organ Co.*, 550.

6. A provision in a chattel mortgage giving the mortgagor the absolute right to dispose of the entire property in one transaction for his own benefit, vitiates the mortgage. *Wilson v. Wallace*, 646.

7. It is the same whether the permission is contained in the mortgage itself or is by independent agreement, and whether it is given at the time the mortgage is executed or subsequently. *Ib.*

8. In such case the fact that the mortgagee has paid off a prior mortgage on the property does not help his title as against an attachment made prior to such payment. *Ib.*

See REPLEVIN 1.

COLLECTOR OF TAXES.

The administrator of a tax collector may enter and prosecute to final judgment a suit begun by such collector in his lifetime for the collection of a tax by trustee process under R. L., ss. 407 and 408. *Smith v. Blair*, 658.

COMMENCEMENT OF SUIT.

1. Defendant agreed in writing to deed the plaintiff certain real estate on or before November 1, 1893, for one thousand and

twenty-five dollars, of which fifty dollars was then paid. On October 30, 1893, plaintiff tendered defendant nine hundred and twenty-five dollars, claiming that he had agreed to throw off fifty dollars for cash, and demanded a deed, whereupon defendant replied that he should be glad to deed, but that his father refused to deed, and that was the end of it. Plaintiff brought this suit for breach of contract October 31, 1893. *Held*,

(a.) That the option to convey on or before November 1 was the defendant's, and that he was under no obligation to convey before that date.

(b.) That while an absolute refusal to perform might justify the plaintiff in treating the contract as at an end, and bringing his suit before the time for performance had elapsed, this was not such an absolute refusal.

(c.) Since it appears from the plaintiff's own testimony that the agreement to discount the fifty dollars was made before the execution of the written contract, that fact cannot be shown by parol. *Vittum v. Estey*, 158.

COMMISSIONERS. *See* ESTATES OF DECEASED PERSONS 1, 2, 3, 4.

COMPLAINT.

In a prosecution for rape, or an attempt to commit rape, the state may show that the prosecutrix made complaint, and the name of the person whom she charged as her assailant, but not the details of her statement. *State v. Carroll*, 477.

COMPETENCY OF WITNESS. *See* WITNESS 3, 4.

CONDEMNATION. *See* WATERS 4.

CONDITIONAL SALE.

1. No. 93, Acts of 1884, providing that in case of the conditional sale of personal property the vendee may, after thirty days from condition broken, cause the property to be sold at public auction by a public officer, does not alter the nature of the vendor's title in the property, and he may still pursue any remedy in respect to the property as before the passage of that act except that in taking and selling it he must follow the statute. *French v. Osmer*.

2. So the vendor may maintain an action on the case against the bailee of the vendee for an injury to the property after thirty days from condition broken. *Ib.*

3. That the bailee has settled with the vendee for such damage is immaterial. *Ib.*

CONFESSION.

1. A confession is admissible, if voluntary, although made while the prisoner is in irons, without counsel, and expecting to die from the effects of poison. *State v. Gorham*, 365.

2. Whether a confession is voluntary and therefore admissible is a preliminary question for the trial court. *Ib.*

3. Upon the determination of this preliminary question the trial court can only consider the evidence introduced, and if, after the confession has been admitted, testimony is introduced to the jury bearing upon its admissibility, the court should not thereupon change its previous ruling, at least unless requested. *Ib.*

CONSTRUCTION OF LEASE. *See* LEASE 2.

CONSTRUCTION OF STATUTE. *See* SLAUGHTERHOUSE 1, 2.

CONTRACT. *See* TRIAL 2; PAUPER 4, 5.

CONTRIBUTORY NEGLIGENCE.

Where there is evidence in the case of contributory neglect, the court is, upon request, bound to instruct the jury upon that subject. *Eastman v. Curtis*, 432.

See NEGLIGENCE 1, 2, 3; RAILROAD COMPANIES.

CONTRACT.

1. A proposition for adjustment met by a counter proposition not assented to does not bind the other party. *Hoyt v. Cate*, 559.

2. *Held*, that there was no evidence tending to show such assent. *Ib.*

CONSTRUCTION OF CONTRACT.

Plaintiffs contracted to sell defendant a farm for twelve hundred dollars; and by the same writing leased it to him for one hundred dollars a year, with the agreement that when he had paid five hundred dollars and interest they would convey and take a mort-

gage for the balance. It was further agreed that the defendant might cut wood and timber provided the proceeds were applied on the purchase price. *Held*, that the proceeds of such wood and timber could not be applied to the payment of the annual rent as it fell due. *Sargent et ux. v. King*, 356.

See TRIAL 7.

CONSTRUCTION OF DEED. *See* DEED 4, 6, 7.

CONSTRUCTION. *See* DEED 1, 2.

CONSPIRACY. *See* CRIMES AND OFFENCES 1.

COSTS.

When the only issue upon trial is the amount due upon the note, the fact that the plaintiff recovered less than his claim does not entitle the defendant to an apportionment of costs. *Farrington v. Jennison*, 569.

COURT OF INSOLVENCY. *See* INSOLVENCY 1, 2, 3, 4.

COUNTY COURT.

1. *Held*, that it did not affirmatively appear that the plaintiff brought his suit to the county court in bad faith, and that, therefore, the defendant's motion to dismiss for want of jurisdiction by reason of the amount involved, was properly overruled. *Bickford v. Trav. Ins. Co.*, 418.

2. It is not error if one of the assistant judges refuse to sit during a trial, although he is not disqualified or incapacitated from so doing. *State v. Bradley*, 465.

CRIMES AND OFFENCES.

1. A combination of two or more persons to constrain an employer to discharge a particular workman by threatening to prevent his obtaining other workmen unless he does so is a criminal conspiracy at common law. *State v. Dyer*, 690.

2. Such offence is a misdemeanor, and the prosecution may be, therefore, by information. *Ib.*

3. R. L., s. 4365, providing that where an offence is punishable by imprisonment it shall be in the house of correction unless specified to be in the state prison, applies to penalties inflicted by the common law. *Ib.*

4. *Held*, that the counts in this information were not bad for uncertainty. *Ib.*

5. The evidence tended to show a conspiracy to compel one McClure to join the Granite Cutters' National Union or quit work, and that in consequence McClure had stopped work. The respondents were all members of this association and in what they did acted as such. *Held*, that the evidence warranted the conviction of Dyer, who was the secretary of the association, although no act of his was shown in connection with the matter until after McClure had actually stopped work. *Ib.*

CRIMINAL OFFENCES. *See* INTOXICATING LIQUOR.

CROSS EXAMINATION.

1. A party may cross-examine the adverse party upon any subject material to the controversy, whether such adverse party has testified about the same in chief or not. *Swerdferger and wife v. Hopkins*, 136.

2. In an action for trespass to the person the plaintiff introduced his father as a witness, who testified that the defendant assaulted the plaintiff, his minor son, and broke his arm. *Held*, that the defendant could not show upon the cross-examination of this witness as affecting his credibility, that witness, who had employed the doctor, offered to settle the case for the doctor's bill if the defendant would settle then without further ceremony. *Neal v. Thornton*, 221.

3. The respondent had no right to inquire, upon the cross-examination of the officer who arrested him, whether he regarded as suspicious certain circumstances to which he had testified in chief, he not having indicated by his conduct or testimony that he so regarded them. *State v. Gorham*, 365.

See RAPE 1, 2; ERROR 1; TRIAL 10, 14, 16.

DAMAGES.

See HIGHWAYS AND BRIDGES 6; EQUITY 6; FENCES 2; INTEREST 1.

DEATH BY WRONGFUL ACT. *See* PENAL STATUTE 2.
DECREE. *See* PROBATE COURT 1.

DECEPTION. *See* CHATTEL MORTGAGE 1, 2, 3.

DECLARATION. *See* INSURANCE 1, 2.

DEED.

1. In construing a contract the object aimed at is to discover and give effect to the intention of the parties; and if the words are equivocal, resort may be had to the circumstances under which it was executed and the contemporaneous construction put upon it by the parties, as evidenced by possession or similar acts. *White & Hammond v. Amsden*, 1.

2. In 1833 the Mill Dam Company acquired title to three water privileges, known as the lower power, the middle power and the great dam power. At the great dam power was a large dam, used for the double purpose of furnishing a head at that point, and of storing water for the two powers below. In 1835 the company enacted by-laws relative to the sale and future government of the several water privileges, and from that time on the water was used by the various privileges in substantially the manner specified in the by-laws. October 30, 1841, the Mill Dam Company conveyed to Wardner the lower power, with all the water and other privileges appurtenant thereto, and to Hubbard the middle power, with all the privileges and appurtenances belonging to it, both conveyances being made subject to the by-laws of the corporation. On the same day the Mill Dam Company executed two mortgages upon the remaining property of the corporation situate at the great dam, excepting therefrom "the land covered by the great dam and by the water when the pond is full." The legal title to the property covered by said two mortgages passed by decree of foreclosure to one Lamson, who also became the owner, in 1864, of the middle power and all of the lower power except the grist mill, and who conveyed his interest, in 1865, to the Windsor Manufacturing Company. October, of the same year, that company executed to the Windsor Savings Bank two mortgages, one for ten thousand dollars upon the property at the upper dam and the other for twenty thousand dollars upon the property at the middle power. Both these mortgages were foreclosed, and under the decrees the defendant obtained title to the great dam property, in 1884, and the testators of the orators to the middle power property at about the same time. The property at the middle power consisted of valuable structures

intended to utilize the water power derived from the great dam. In 1885 the defendant made certain repairs upon the great dam, and claimed and collected of the owners of the middle power and the lower power that proportion of the expense of such repairs provided for by the by-laws. The description in the mortgage, under which the defendant claims, is by reference to former deeds, adding the words, "together with the various shops, mills, dwelling houses, and other buildings thereon standing, and the steam engine, boiler and appurtenances thereto belonging, and the main shafting in said building, and all the water power."

Held, that under this description, in view of the relative value of the different properties, the circumstances under which and purposes for which they had been erected, the manner in which the water power had previously been and was then being utilized, and the practical construction put upon his rights by the defendant, later, in 1885, the defendant took not the entire water power at the great dam, but only those rights therein to which the property there situate was entitled under the by-laws of the Mill Dam Company. *Ib.*

3. Where the grantee, upon receiving a deed of real estate, executes, to give effect to the contract in pursuance of which the deed was made, a written instrument specifying that the grant is upon condition that the grantee shall support the grantor for life, the two instruments should be read together, and the writing not under seal will have exactly the same effect upon the legal title conveyed by the deed as though it were written into that instrument. *Norton's Admr. v. Perkins*, 203.

4. A conveyance of "any interest that we or either of us may have in any other real estate" will not carry an after acquired interest. *Paddock v. Potter*, 360.

5. The mere execution of an undelivered deed does not convey an interest in the premises to a grantee who has no legal right to demand a conveyance, and if the deed is subsequently delivered the grantee's title will date from the delivery. *Ib.*

6. The most important rule in the construction of deeds is that the intention of the grantor, if not unlawful, shall govern. *Graves v. Mattison*, 630.

7. A, being the owner of a tract of land, conveyed to B a par-

cel forty-seven feet wide from the westerly side. The point of beginning was the northwest corner and the deed located this as forty-five feet from the north-east corner of a certain store. Subsequently A conveyed to C a second parcel from the same tract easterly of and adjoining the first parcel. The point of beginning in this deed was the northwest corner of the parcel, which was described as ninety-one feet from the same store corner, being the northeast corner of the first parcel. The west line of the last parcel was described as running along the east line of the first parcel. *Held*, that it was the manifest intention of the grantor that the west line of the second parcel should be coincident with the east line of the first parcel and that the ninety-one feet must be rejected as surplusage. *Ib.*

DEFENCE. *See* SET-OFF 1, 2.

DELIVERY. *See* DEED 5.

DEMURRER. *See* PLEADING 1, 2, 3.

DISBARMENT. *See* ATTORNEY 1, 2.

DISCHARGE. *See* MORTGAGE 1.

DISTRICT. *See* SCHOOLS 9.

EASEMENTS AND SERVITUDES.

1. When real estate is so employed by the owner that the use of one parcel creates an easement in that parcel and a servitude upon another, that condition will inhere upon distribution among heirs, and the right will pass to the one taking the dominant parcel as by an implied grant. *Mason v. Horton*, 266.

2. An easement by grant is not lost through mere non-user. To work that result, the conduct of the owner of the dominant estate must be such as to plainly indicate an intention to abandon the easement, and this must have been acted upon by the owner of the servient estate so as to make its revival inequitable as against him. *Ib.*

3. The defendant's mill privilege took the water at a point above the plaintiff's dam, and discharged it into the river at a point below so that the plaintiff's privilege lost the benefit of it. *Held*, that the mere non-user of the defendant's privilege for more than fifteen years did not work a forfeiture of this right in it, nor

create in the plaintiff's privilege a right to have the water flow in its natural channel. *Ib.*

EJECTMENT.

1. The defendant, having performed all the conditions of the lease, elected to purchase, and so notified the plaintiff, who thereupon refused to convey, and brought suit in ejectment. *Held*, that that action would not lie, for the plaintiff was no longer a lessor, but a vendor. *Mack, Admr., v Dailey*, 90.

2. In such case the grantor may maintain ejectment for a non-compliance with the conditions expressed in the writing not under seal. *Norton's Admr. v. Perkins*, 203.

3. That the intestate made this conveyance in fraud of his creditors, or fraudulently concealed from the defendant the fact that he was then owing debts, would be no defence in this action of ejectment for a breach of the conditions. *Ib.*

See EXECUTION 1.

EMANCIPATION. *See* PAUPER 10.

EMINENT DOMAIN. *See* WATERS 5.

EQUITY.

1. A party who would insist upon prescriptive rights, acquired by adverse possession, in answer to the rights claimed by the orator in a suit in equity, must set up such prescription in his answer. *White & Hammond v. Amsden*, 1.

2. The defendant was under no personal duty, by reason of his title to said great dam property, to open and shut the gates in the great dam in accordance with the by-laws of the Mill Dam Company. *Ib.*

3. Where the bill alleges that the orator was the owner of the spring, and the answer denies this and sets up ownership in the defendant, the question of title is in issue, although the purpose of the bill is to enjoin the defendant from befouling the water. *Coffrin v. Cole*, 226.

4. A decree, confirming the title of the orator and enjoining the defendant from interfering with the orator's use of the spring, was proper upon the case thus made. *Ib.*

5. The Paragon Marble Company, being indebted to the ora-

tor in the sum of two thousand five hundred dollars, induced him to give his mortgage note to the defendant Stannard, who advanced him the money for that amount upon the agreement of the company to pay the note when due. The other defendants, who were the principal stockholders in the marble company, and interested that the arrangement should be consummated for that reason, agreed with Stannard to indemnify him against loss on the note, but did not agree with the orator to pay it. *Held*, that the orator could not compel Stannard to resort to the other defendants first, nor the other defendants to pay the note. *Stiles v. Stannard*, 246.

6. Equity will enjoin an abutter from interfering with the maintenance of a telegraph line so constructed by his consent, and damages for injuries done the line may be decreed in the same suit. *Western Union Tel. Co. v. Bullard*, 272.

7. The equitable powers conferred upon law courts in connection with the action of account have reference to the administration of suits where the title of the parties is legal. They do not confer jurisdiction where the title is equitable. *Leonard v. Leonard*, 318.

8. If two persons jointly take possession of the real and personal estate of an insane person and manage the same, they thereby become guardians by construction, and are liable to account under the rules applicable to a trustee *de son tort*. *Bailey v. Bailey*, 494.

9. An heir of such insane person may, after his decease, maintain a suit in equity for an accounting to the estate against such intermeddlers, although one of them is the administratrix of the estate and the other has presented a claim against it. *Ib.*

10. Such a bill is not multifarious because it sets out particular instances in which the defendants have received moneys for which they ought to account, so long as it goes for an accounting upon their whole proceeding. *Ib.*

11. A chancellor has no power to allow or deny an appeal from his decree. If the decree is one from which an appeal can be taken, the mere filing of a motion therefor secures it. *Smith et al. v. Burton et al.*, 514.

12. In this instance, upon the request of all parties, the court

considered the case as properly before it on appeal, without inquiring whether the decree was such that an appeal would lie. *Ib.*

13. A court of equity can decree the sale of property in the hands of a receiver when necessary to preserve the interests of all parties, although the rights of the parties to the property have not yet been adjudicated. *Ib.*

14. Such sale may be decreed without any special petition therefor where the bill itself prays for a sale and a receivership pending the sale. *Ib.*

15. The residuary legatee filed a written request in the probate court, before the settlement of the executor's account, that the residue of the estate, without the amount thereof being determined, might be decreed to the executor. Thereupon the probate court, upon due notice to all interested, determined that the amount of the estate was sufficient to pay all debts and specific legacies, and ordered the executor to pay the same and hold the balance of the estate as requested by the residuary legatee. *Held*, that by this decree, unappealed from, the creditors and specific legatees lost their lien upon the property of the estate not specifically devised, so that they were not necessary parties to a suit in equity concerning a portion of it, and that the same might be sold under order of the court clear from liens and incumbrances. *Ib.*

See PROBATE COURT 3; AMENDMENT 3.

ERROR.

1. When the right of cross-examination is denied at the time when it should have been allowed, the error is not cured by subsequently recalling the witness and offering to the excepting party the privilege of cross-examination which he desires. *State v. Hollenbeck*, 34.

2. A judgment will not be reversed by reason of an erroneous instruction which could not have prejudiced the excepting party. *Purdy v. Estate of Purdy*, 50.

3. The construction of a stipulation by the county court will not be revised in the supreme court if it is legally susceptible of the construction put upon it. *Standard Gran. Co. v. Aikey*, 116.

4. A written stipulation between counsel that a cause pending before a justice shall be continued to a certain day, and that if there is "any reason" why either party cannot attend on that day it shall be further continued to a subsequent day, is susceptible of the interpretation that in case of inability of one party to attend, the cause must stand continued, and that the justice has no jurisdiction to render judgment. *Ib.*

5. Error in the admission of testimony is not cured by the fact that later in the trial the one introducing it claims no benefit from it. *Norton's Admr. v. Perkins*, 203.

6. If the judgment is correct, it will not be reversed for error in the proceedings. *Johnson v. Kelley et al.*, 386.

7. It is not error to refuse to comply with a request to charge unless the evidence warrants the charge. *State v. Perrigo*, 406.

8. If the respondent cannot have been harmed by an error in the charge, the judgment will not be reversed. *Ib.*

9. If a respondent may have been injured by the admission of irrelevant testimony, and it does not affirmatively appear that he was not, the judgment will be reversed. *State v. Plant*, 454.

10. Where testimony is stricken out, at the respondent's request, no exception is taken upon the trial concerning it, no question is presented to the supreme court. *State v. Bradley*, 465.

11. Where a ruling is within the discretion of the trial court, it will be presumed to have been made as a matter of discretion, unless the contrary affirmatively appears. *Ranney, Admr., v. R. Co.*, 594.

12. Where a motion is addressed to the discretion of the county court, it is reversible error to overrule it *pro forma*, for the party making it is entitled to have the court exercise its discretion. So held of a motion to set aside a verdict for that the damages were excessive. *Ib.*

13. Where there is nothing on the record to show that the commissioners and county court in fixing the amount of damages did not adopt the correct rule, the judgment will be affirmed. *Baxter v. Rutland*, 607.

14. Error will not be presumed. *Brooks v. Guyer*, 669.

See CHARGE OF COURT 3, 5, 6, 7.

ESTATES OF DECEASED PERSONS.

1. A creditor may withdraw his claim presented to commissioners upon the estate of a deceased person at any time before it has been acted upon. *Kenney et al. v. Howard*, 375.

2. The probate court has no jurisdiction of claims in favor of an estate except in the way of an offset to claims presented against the estate, and the executor or administrator may commence and prosecute a suit at law in favor of the estate under R. L., s. 2131, until the debtor has presented a claim against the estate, and that claim has been acted upon by the commissioners. *Ib.*

3. After an executor or administrator has properly begun an action at law upon a claim in favor of an estate, all proceedings in the probate court in respect to that claim or any offsets thereto are suspended. *Ib.*

4. If a creditor presents his claim against an estate to commissioners, and the executor thereupon presents claims in favor of the estate in offset, and the commissioners act upon the matters so before them, *all* actions at law between the parties are thereby barred as by an adjudication, and a plea of this judgment in bar of a suit subsequently brought by the executor need not allege that the matters embraced in such suit were specifically passed upon by the commissioners. *Ib.*

See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL. *See* JUDGMENT 1.

EVIDENCE.

1. Evidence that a third person, at the request of the prosecutrix, but not in her presence, told her mother of the alleged rape, is inadmissible. *State v. Hollenbeck*, 34.

2. That a debtor claimed an offset in his tax inventory on account of a particular indebtedness one year and did not the next, has, of itself, no tendency to show the indebtedness paid. *Purdy v. Purdy's Est.*, 50.

3. Having elected to stand upon the written contract, the defendant cannot vary its terms by parol. *Tatro v. Bailey*, 73.

4. The plaintiffs claimed that under their deed they took to a certain line, and that if they did not obtain title by their deed they

had it by adverse possession. *Held*, that a former occupant and owner of the premises might testify that he understood the line to be at that time where the plaintiffs now claim it. *Swerdferger and Wife v. Hopkins*, 136.

5. A former owner and occupant might testify that upon one occasion the owner of the adjacent lot, under whom the defendant took title, claimed a portion of the land occupied by him, and that he thereupon told said owner that he, the witness, had bought to the line claimed by the plaintiff, and should hold to that line unless legally prevented. *Id.*

6. The statements of a witness made to a third person, not in the presence of the defendant or his grantor, tending to show the contents of a written instrument, as to which parol testimony had been excluded, were improperly admitted. *Id.*

7. Statements of a former owner or occupant to a third person, not in the presence of the defendant or his grantor, as to what had been the extent of that owner's occupancy, were improperly admitted. *Id.*

8. A witness called by the defendant testified that a former owner of the plaintiff's land pointed out on one occasion the boundary of his lot. *Held*, that the plaintiff might properly ask him, on cross-examination, what the owner said about the boundary of the lot when pointing it out. *Id.*

9. A witness of the defendant having testified that, when working for a former owner of the defendant's lot, he had piled lumber belonging to such owner upon the premises in dispute, he may be properly asked on cross-examination with reference to disputes between the owners of the respective lots growing out of the placing of the lumber there. *Id.*

10. In case of a conveyance of property conditioned for life support, the value of the property may be shown as bearing upon the character of the support to be furnished, where the conditions leave that indefinite. *Norton's Admr. v. Perkins*, 203.

11. Where it is understood that the support is to be furnished upon the premises, and the parties have entered upon the fulfillment of the contract, the fact that the grantor, after an absence of some time, returns and receives his support without complaint, is evidence tending to show a waiver of any previous breach of the conditions. *Id.*

12. If the defendant was bound to furnish the support only on the premises, evidence that he did not support the intestate while absent is inadmissible. *Ib.*

13. What the intestate did and said while absent from the premises would have no tendency to show a breach of the conditions. *Ib.*

14. Neither did the fact that the plaintiff, who was a son of the intestate, refused to visit his father at the defendant's house because defendant was a man of bad disposition, have such tendency, and was not admissible. *Ib.*

15. A record of a criminal proceeding which recites that complainant averred that six turkeys had been stolen from him, and that the respondent had found the same, and that the respondent was arraigned upon this charge and convicted of the same, does not show that he was convicted of a crime, for it is not a crime to find stolen property. *Ib.*

16. The defendant claimed title to the spring in dispute by adverse user by herself and grantor. Her deed conveyed "all the right" of the grantors "to take water from the spring on the granted premises." *Held*, that it might be shown by parol that the grantor of the defendant told her at the time the deed was made that she had no interest in the spring, but only a verbal license to pump water from it. *Coffrin v. Cole*, 226.

17. The question being whether the sum claimed by the plaintiff for serving a writ as deputy sheriff was more than the legal fees, the defendant may be asked on cross-examination whether he knows any reason why that charge is not correct. *Hamilton v. Gray*.

18. As tending to show that the plaintiff was entitled to recover his fees for attending as a witness in a suit of the defendant, the clerk's taxation of the defendant's costs in that suit, in which the attendance of the plaintiff was taxed is admissible. *Ib.*

19. The plaintiff claimed that the alleged trespasses were committed on a ten acre parcel of which the original grant was in 1806, the deed of that date being introduced by the plaintiff. If the boundaries of this parcel were as claimed by the defendant, there would be no water upon it; if as claimed by the plaintiff, they would embrace a brook. The plaintiff offered to show "that

the ten acre piece had long been used as a pasture, which would have no water in it if its south-east corner was where defendant claimed." This was excluded. *Held*, no error, for the offer was not equivalent to an offer to show that the parcel was so used in 1806. *Martyn v. Curtis*, 263.

20. The intestate was mentally and physically feeble, and the defendant transacted her business for her, receiving and disbursing money on her account. *Held*, that evidence that upon one occasion the defendant received pay for some cattle belonging to her, that upon another occasion he exhibited a sum of money, saying that it was money of the intestate, and that upon still another occasion he searched the trunk of the intestate, and carried away a sum of money found there after giving her a receipt, tended to show that defendant had these several sums, and should account for them. *Crampton v. Seymours*, 393.

21. But that defendant, upon being told by a creditor of the intestate that he had paid her a sum of money, said he must go and get it, does not tend to show that this sum ever came into his hands. *Ib.*

22. It did not appear that there was any contract between the intestate and the defendant that defendant should receive compensation for his services. *Held*, that the declarations of the defendant that he did not expect anything were evidence tending to prove that fact, and that the finding of the county court disallowing his claim for services would not be disturbed. *Ib.*

23. The defendant was under contract with the pauper's father to support him until the termination of a certain suit, which ended June 1, 1889. The plaintiff claimed that after the termination of this suit the father supported the pauper under an implied contract with the defendant. *Held*, that evidence that the father learned of the termination of the suit and afterwards began and prosecuted a claim against the defendant for support furnished subsequently to June, 1889, had no tendency to show such an implied contract, and was improperly admitted. *So. Burlington v. Worcester*, 411.

24. It appeared that the testator had been for some time habitually addicted to the excessive use of intoxicating liquor. The evidence of the proponent tended to show that shortly before the exe-

cution of the will the testator drank some whiskey, but was comparatively sober and rational at the time, while the testimony of the contestants tended to show that he was so drunk that he knew nothing. *Held*, error to instruct the jury that they were not to consider the habits of the testator as to intoxication in determining his condition at that time. *Smith's Exr. v. Smith*, 443.

25. The respondent was indicted for the larceny of a team at Sunderland. He testified upon the trial that he was not in that vicinity at the time of the larceny. *Held*, that a baggagemaster upon the B. & R. railroad might testify that the night before the larceny a man rode in his car, and disappeared about the time the train passed Sunderland, and that two or three days afterwards he saw and spoke to the same man on the train, it appearing from other evidence that this man was the respondent. *State v. Young*, 450.

26. A physician of fourteen years' practice may give an opinion, as an expert, that a stain upon the knife, with which it was claimed that the homicide was committed, and which he examined soon after the homicide, was a blood stain. *State v. Bradley*, 465.

27. The fact that the witness, in answer to a question calling for his opinion, replied "we thought," does not render the testimony inadmissible, it not appearing that any other person examined the knife with him. *Id.*

28. An altercation between the deceased and respondent, two days before the killing, accompanied by personal violence, was held admissible under the circumstances of this case. *Id.*

29. The remoteness of time at which the respondent threatened to kill the deceased goes to the weight and not to the competency of the testimony. *Id.*

30. Inculpatory conversations between the prisoner and another are admissible, although both are at the time under arrest for the commission of the crime. *Id.*

31. *Held*, that the evidence tended to show that the defendant, Milton G., knew soon after April 11, 1891, that the orator claimed that the conveyances from the defendant, Geo. M., to himself of that date were in fraud of the orator's rights. *Hubbard v. Moore*, 532.

32. In determining the indebtedness of the firm the list of its

liabilities contained in the tax inventory made up by one of the defendants was properly admitted. *Ib.*

33. As bearing upon the question whether this real estate was partnership property, the fact that it was set in the grand list to the firm and that the firm paid taxes on it was admissible. *Ib.*

34. The question being whether the defendant, Geo. M., was indebted to the defendant, Milton G., at a certain time, the tax inventory of the latter covering that period, signed but not sworn to, was properly admitted. *Ib.*

35. *Held*, that under the circumstances of the case the orator might testify that he understood that the real estate was embraced in the written agreement of co-partnership. *Ib.*

36. Notice to produce must be given before the contents of a written instrument can be shown where there is a privity between the party to the suit and the one having custody of the writing. *Held*, that there was such privity between the plaintiff in a writ of possession and an officer sued for trespass committed in serving the same. *Murray v. Mattison*, 553.

37. The question was whether the house from which the plaintiff had been evicted upon a writ of possession against her husband, had been rented to her or her husband by the owner Hall. *Held*, that letters from the housekeeper of Hall about the renting of the same were material and that the plaintiff must show their loss before she could prove their contents. *Ib.*

38. It appeared that the husband of the plaintiff had, for the most part, paid the rent by remittances sent by letter, directly to Hall, and had received receipts therefor, all of which the plaintiff well knew. *Held*, that a letter from the husband, enclosing a money order for rent and asking that certain repairs be made, was admissible. *Ib.*

39. But this outlawed note was not the cause of action or contract in issue and on trial, being collateral thereto, and the defendant should have been allowed to testify to conversations with the plaintiff in respect to it. *Farrington v. Jennison*, 569.

40. The action being for the alleged negligence of the defendant resulting in the death of the plaintiff's intestate, it is not error to allow the physician who attended the intestate to testify that he

has received no compensation for his services from any source, nothing further appearing. *Ranney, Admr., v. R. Co.*, 594.

41. The train bearing the intestate arrived from the east. Passengers from that train alighted upon a platform about six feet wide, and from thence passed across another track of the defendant to the station platform. Just as the passengers upon this train were alighting, another train of the defendant from the west drew in upon the track between the narrow platform and the station platform, and the intestate was in some unexplained way drawn under the wheels of the latter train. There was an unusual crowd upon the platforms that morning, and the trains did not arrive upon schedule time. *Held*, that evidence that other railroads at certain specified points employed a similar arrangement of tracks and discharged passengers in the same way, was properly excluded. *Ib.*

42. One question being whether the intestate voluntarily incurred the danger from which she suffered, while under the reasonable apprehension of a real or apparent peril, evidence that just before her own accident another person in attempting to cross from the narrow platform to the station had narrowly escaped being run over by the same train which had injured her, and that the episode had been attended with considerable noise and confusion, is admissible. *Ib.*

43. Evidence offered by the defendant that its cattle guard was like those in common use by other companies, which had proved sufficient, was properly excluded for the reason, if no other, that the offer did not propose to show that the others were used under similar circumstances. *Howard's Admr. v. Rd Co.*, 664.

44. The defendant claimed title to the goods in suit under bill of sale from the plaintiff. The plaintiff denied the execution of the bill of sale, and insisted that the defendant had obtained possession of the goods by frightening him out of the state. *Held*, that the plaintiff was properly allowed to testify that just prior to the date of the bill of sale the defendant told him that unless he left the state he would be arrested. *Brooks v. Guyer*, 669.

45. *Held*, that a conversation between two of the respondents and a third person which took place on the Sunday next after the week during which the acts complained of were committed, was properly received, first, because it connected these respondents

with the crime, and, second, because it was so near the acts in point of time as to be virtually concomitant with them. *State v. Dyer*, 690.

See CROSS-EXAMINATION 2; PERJURY 2; ACCOUNT; WILL 11, 12; HOUSE OF ILL FAME 2; HUSBAND AND WIFE 6; INSOLVENCY 5, 6, 7; PRACTICE 3; TRUST 7; WITNESS 3, 4; TRIAL 19, 20; AGENT 2, 4; COMMENCEMENT OF SUIT 1.

EXAMINATION OF WITNESS. See TRIAL 11, 12, 13.

EXCEPTIONS.

1. If the stenographic transcript is referred to for the purpose of showing what exception was taken to the testimony of a witness, and it appears from such transcript that the question made in supreme court was not raised in the court below, it will not be considered. *Coolidge v. Cont. Ins. Co.*, 14.

2. To sustain a general exception to an entire portion of a charge, that portion as a whole must be erroneous. *Dickerman v. Ins. Co.*, 609.

3. A request to charge that certain words are actionable, is not faulty as to the words which are, because it embraces other words which are not. *Clemmons v. Danforth*, 617.

4. When the exceptions state the tendency of the testimony, it will be presumed that the whole tendency is stated. *Ib.*

See PRACTICE 4, 6; ERROR 13; TRIAL 21.

EXECUTORS AND ADMINISTRATORS.

1. A special administrator has no authority to compound a disputed claim, but if he does so in good faith, and those interested in the estate are present upon the settlement of his account and acquiesce in his action, they will be estopped from afterwards setting up his want of authority. *Foster's Exr. v. Stone*, 336.

2. An administrator should be allowed nothing for services rendered in the maladministration of an estate; but if his administration has been faithful for a certain period, he may be allowed for services during that period, although his subsequent administration was unfaithful. *Ib.*

3. An administrator who has misappropriated to some extent the funds of an estate, may be allowed for counsel fees upon a

final accounting in the probate court, if the necessity for such legal services does not arise from the fact of the misappropriation. *Ib.*

4. A claim against a deceased person as executrix cannot be presented to commissioners upon her estate, but must be determined upon the settlement of her account as such executrix in the probate court. *Davis, Admr., v. Flint's Est.*, 485.

See PARTIES.

EXECUTION.

A certified execution may issue to enforce a judgment for rent recovered in an action of justice ejectment. *Sheeran v. Rockwood*, 82.

See HOMESTEAD 2, 3.

EXECUTION OF INSTRUMENT. *See* INSURANCE 10, 11.

EXPERT. *See* EVIDENCE 26.

FALSE REPRESENTATION. *See* FRAUD 1.

FENCES.

1. The statutory provision that the owners of lands bordering upon highways need not fence the same along such highway does not apply to pent roads. *Carpenter v. Cook*, 102.

2. The plaintiff's fence was broken down by the unruly cattle of the defendant, which then and on subsequent occasions entered through the break, and damaged the plaintiff's fields. *Held*, that the defendant was liable for damages to the fence and for damages to the fields until the plaintiff had reasonable opportunity to repair the fence, but not afterwards. *Watkins v. Rist*, 284.

FIXTURES.

1. Whether machinery attached to the freehold after the execution of a mortgage, and not referred to in the mortgage, belongs to the mortgagee or to the grantee of the mortgagor must be determined by the decisions in this state, as though the statute permitting the mortgaging of machinery had never been enacted. *Kendall v. Hathaway et al.*, 122.

2. In order to change the character of property from chattel to real by annexation to the freehold, it must be attached in such a

manner that it cannot be removed without permanent injury to the realty or to the property itself as a chattel. *Ib.*

3. A cider mill and a shingle mill standing on legs, and only held in place by the belts which run them, and a circular saw-mill so attached to the building that it can be removed without damage to itself or the building, are chattels, and do not pass under the mortgage. *Ib.*

FORECLOSURE. See INSURANCE 7.

FORMER ACQUITTAL.

If a respondent, upon an indictment for murder in the first degree, is convicted of murder in the second degree, and thereupon alleges exceptions, which are sustained, he may be again tried for murder in the first degree. *State v. Bradley*, 465.

FRAUD.

1. The defendant, being liable as principal to the plaintiff upon a promissory note, was adjudged an insolvent. During the pendency of insolvency proceedings and after the granting of his discharge, he was induced by the false representations of a surety on the note and the assignee in insolvency to the effect that the note had not been allowed against the insolvent estate, and that his liability upon it would not be relieved by his discharge, to sign from time to time renewals of the note. *Held*, that he could not avoid his liability upon the last of these renewals by reason of such false representations, for the parties who made them did not represent the persons. *First Nat'l Bank v. Fitts*, 57.

2. While a promise by the payee at the time of obtaining a promissory note not to enforce it, cannot be shown in defence to a suit on the note, it may be shown that the note was obtained by fraudulent representations of which the statement that it should be returnable to the maker before maturity was one. *Wilbur v. Prior*, 508.

3. *Held*, that the evidence tended to show such fraudulent representations. *Ib.*

4. The defendant was surety on the bond of a town constable who had made default in the service of process. The plaintiff, as the attorney of the party damaged by such default, fraudulently induced the defendant to give the note in suit for the amount of the

default. *Held*, that it could not be affirmed as matter of law that the defendant was not injured by the fraud, for his liability as bondsman might never have been established against him. *Ib.*

See PARTNERSHIP 3.

FRAUDULENT CONVEYANCE. *See* INSOLVENCY 8.

GRAND LIST.

As the law stood in 1886, the neglect of the listers to file in the town clerk's office on or before September 15 a copy of the quadrennial appraisal, as required by R. L., s. 308, did not vitiate subsequent grand lists based upon that appraisal. *Smith v. Blair*, 658.

See TAX SALE 1; TAXES 5, 6, 7, 8, 9, 10, 11.

GENERAL COUNTS. *See* INSURANCE 12.

HARMLESS ERROR. *See* ERROR 2, 6, 8.

HABIT OF INTOXICATION. *See* EVIDENCE 24.

HIGHWAYS AND BRIDGES.

1. Upon the coming in of the report of commissioners appointed by the supreme court upon petition for the establishment of a highway running through two towns, if the report fails to show that a particular land owner had notice of the proceedings, and he makes affidavit that he had no such notice, the report should be recommitted, with instructions to give such notice and an opportunity for hearing. *Walbridge v. Cabot and Walden*, 114.

2. No. 16, Acts 1884, does not authorize the laying of a lane less than three rods wide, to be used without gates and bars, for such a lane is an open highway and not a pent road. *Bridgman v. Hardwick*, 132.

3. A lane does not connect highways within the meaning of that act unless each end terminates in a highway. *Ib.*

4. Under R. L., s. 2920, the selectmen may resurvey a highway whose boundaries and termini cannot be determined, provided the fact of the original survey be established. *Trudeau v. Sheldon*, 62 Vt. 198, explained. *Culver v. Fair Haven*, 163.

5. Commissioners appointed by the county court upon an appeal from the action of the selectmen, if they find that the original boundaries cannot be determined, should then proceed with the

other questions in the case, and having failed to do so, their report will be recommitted. *Ib.*

6. The selectmen took the land of the petitioners for a highway, and made an award of damages. The petitioners applied to the county court for the appointment of commissioners, and subsequently, pending those proceedings, built upon the land taken. *Held*, that they were entitled to damages for the taking of their land in the condition and situation it was at the time of the proceedings before the selectmen. *Lloyd & Culver v. Fair Haven*, 167.

HOMESTEAD.

1. Under our statute subjecting a homestead to attachment upon "causes of action existing at the time," the homestead is attachable upon a note given after its acquisition in renewal of a note existing before. *Robinson v. Leach*, 128.

2. When the plaintiff seeks to charge the homestead of the defendant with the judgment to be obtained, he may waive those items in his account which accrued subsequently to the acquiring of the homestead. *Titus v. Warren*, 242.

3. It is the *existence* of the cause of action, and not whether the demand is due, which determines the liability of the homestead. *Ib.*

4. A dwelling house in process of erection may be exempt from attachment as a homestead. *Woodbury v. Warren*, 251.

5. The rule stated in *Rice v. Rudd*, 57 Vt. 6, affirmed. *Ib.*

HOUSE OF ILL FAME.

1. There cannot be a conviction, upon a single count, of keeping a house of ill fame at two different places, for the keeping at each place is a distinct offence. *State v. Plant*, 454.

2. In a prosecution for keeping a house of ill fame, evidence of the reputation of the house is irrelevant and inadmissible, for

(a) The words "ill fame" in the statute refer to the character of the place in fact and not to its repute, so that its reputation is not an element of the offence to be made out by the state; and

(b) Reputation that the house is one of ill fame is not evidence tending to show that fact. *Ib.*

HUSBAND AND WIFE.

1. A wife may prove as a debt against the insolvent estate of her husband his note which has become her property by inheritance. *Purdy v. Estate of Purdy*, 56.

2. The rule as to what equitable demands may be proved is the same with insolvent estates as with the estates of deceased persons. *Ib.*

3. The wife is a competent witness in a suit to establish her claim against the insolvent estate of her husband. *Ib.*

4. Husband and wife may join in an action for trespass to the real estate of the wife if the husband has any marital rights therein. Whether they can so join in case of real estate held to the sole and separate use of the wife, is not decided. *Swerdferger and Wife v. Hopkins*, 136.

5. The husband and wife being properly joined as parties, the wife was a competent witness. *Ib.*

6. The husband is properly joined as a co-plaintiff and may testify if so joined in a suit for an injury to the realty of the wife, which is not held to her sole and separate use; and real estate given by the husband to the wife is not so held. *Minard v. Currier*, 489.

See TRUST 3.

HYPOTHETICAL QUESTION. *See* TRIAL 19.

ILL-FAME. *See* HOUSE OF ILL-FAME 1, 2.

INDICTMENT. *See* PERJURY 1.

INFORMATION. *See* CRIMES AND OFFENCES 2; PRACTICE 7.

INJUNCTION. *See* LATERAL SUPPORT 2.

INSOLVENCY.

1. A wife may prove as a debt against the insolvent estate of her husband his note which has become her property by inheritance. *Purdy v. Estate of Purdy*, 50.

2. The rule as to what equitable demands may be proved is the same with insolvent estates as with the estates of deceased persons. *Ib.*

3. A non-negotiable claim, which has been assigned, may be proved against an insolvent estate in the name of the real owner.

Ib.

4. So if a wife has received by inheritance a note signed by her husband she may prove it in her name against his insolvent estate, although it is not negotiable in form, or, being negotiable, has not been endorsed. *Ib.*

5. The suit being to recover property conveyed in fraud of the insolvency law, the amount of debts due the insolvent is material, and the exclusion of evidence upon that subject error. *Amsden v. Fitch & Enright*, 522.

6. *Held*, that evidence that a part of the proceeds from the property conveyed was used to pay a note of the insolvent should have been admitted. *Ib.*

7. As bearing upon his intent, the one taking the conveyance may state that he had no doubt that the insolvent would pay his debts in full. *Ib.*

8. The sale by a retail dealer of his entire stock in trade is not made in the ordinary course of business, and is *prima facie* in fraud of the insolvent law under R. L., s. 1861. *Ib.*

9. A sale by an assignee in insolvency, under order of court, of mortgaged property, without notice to the mortgagee, cannot affect the rights of such mortgagee under the mortgage. *Olcott, Admr., v. Davis*, 685.

INSURANCE.

1. At law a writing cannot be referred to and made a part of the declaration, and such a reference adds nothing to the other allegations. *Cooledge v. Cont. Ins. Co.*, 14.

2. In declaring upon a contract containing an exception or qualification, the exception or qualification must be set forth, and a failure to do so will constitute a variance. *Ib.*

3. A declaration upon a policy of insurance promising to insure the plaintiff against loss "except as hereinafter provided," must state the excepted instances. *Ib.*

4. So if the policy is to insure personal property contained in a certain building, it is a variance to declare upon a promise to insure the property generally without reference to its location. *Ib.*

5. Also to allege an absolute promise to pay the loss, without stating any time of payment, when by the terms of the policy it was not payable until sixty days after proofs of loss. *Ib.*

6. But the conditions and stipulations in the policy which are distinct and collateral and do not qualify the promise need not be stated. *Ib.*

7. The policy provided that it should be void if foreclosure proceedings were commenced with the knowledge of the assured. *Held*, that the policy would not be rendered void by the pendency of such proceedings at the time of its issue. *Ib.*

8. A declaration upon a policy of fire insurance must allege an insurable interest in the plaintiff both at the time of the issuing of the policy and the happening of the loss. *Dickerman v. Ins. Co.*, 99.

9. *Quere*, Whether this declaration sufficiently alleges that the loss was payable before the suit was begun. *Ib.*

10. The plaintiff is not required to prove the execution of an accident insurance ticket on trial unless the defendant has, under county court rule No. 12, given notice that it will deny the execution. *Bickford v. Ins. Co.* 418.

11. The possession of the ticket by the plaintiff is evidence tending to show that it has been issued and delivered to him by the defendant. *Ib.*

12. The defendant objected to the admission of the ticket as evidence for the reason that no recovery could be had upon it under the general counts. *Held*, that the objection was properly overruled, for (a) a recovery may be had upon a conditional contract under the general counts, and (b) in this case there was a special count in indebitatus assumpsit upon this accident ticket, and it may be presumed, the contrary not appearing, that the recovery was upon this count only. *Ib.*

13. The contract of insurance in this case provided for an indemnity not exceeding twenty-six consecutive weeks, and that proofs of claim should be furnished within seven months from the date of injury. *Held*, that no recovery could be had for any period after the date of the final proof of loss. *Ib.*

INTENTION. *See* PAUPER 1, 2, 3.

INTEREST.

Where commissioners appointed by the county court to assess damages report that the petitioners "are entitled" to a sum named, it will be presumed that they included interest to the first day of the term to which their report is returned. *Bridgeman v. Hardwick*, 653.

INTOXICATING LIQUOR.

1. Under the statutes prohibiting the traffic in intoxicating liquor, ignorance of the nature of the thing sold is no excuse. *State v. Tomasi*, 312.

2. In a prosecution under R. L., s. 3802, as amended by No. 42, Acts 1888, for keeping intoxicating liquor with intent to sell, a previous conviction for selling may be shown to enhance the penalty. *State v. Sawyer*, 239.

JEOPARDY. See FORMER ACQUITTAL.

JOINT LIABILITY. See JUDGMENT 2.

JOINT TRIAL. See TRIAL 22.

JUDGMENT.

1. A judgment in chief for the plaintiff, following the finding of an issue of fact raised by the defendant's plea in abatement in favor of the plaintiff, is in the nature of a penalty upon the defendant, and does not conclusively establish a right of recovery upon the merits in another suit between the same parties. *Jericho v. Underhill*, 85.

2. The declaration contained two counts; one for assault upon the plaintiff, and the other for trespass to her goods. Two of the defendants justified as to the first count, and all as to the second. The jury, by special verdict, assessed damages on each count. *Held*, that a judgment for the entire damages against all the defendants was erroneous, for that it did not fairly appear from the exceptions that the jury had found all the defendants guilty under the first count. *Murray v. Mattison*, 553.

See *Audita Querela* 1, 2.

JURISDICTION. See EQUITY 7; PROBATE COURT 3, 4; PLEADING 5, 6; COUNTY COURT 1.

JUSTIFICATION.

Held, that the evidence did not tend to show a justification of the assault by the respondent upon the officer, whether the arrest was lawful or unlawful. *State v. Perrigo*, 406.

KNOWLEDGE. *See* INTOXICATING LIQUOR 1.

LAKE CHAMPLAIN. *See* WATERS 3.

LANDLORD AND TENANT.

1. If a landlord suffers his tenant, who has been holding under a written lease providing for the payment of an annual rent, to remain in possession and pay rent for one full year after the expiration of the term and to enter upon a second year, the tenancy thereby becomes one from year to year, and the tenant may complete the second year. *Amsden v. Atwood*, 289.

2. The fact that the tenant, after receiving a notice to quit after entering upon the second year, decides to vacate the premises and removes a part of his machinery, does make due rent which would not be due by the terms of the lease, there being no surrender of the premises by the defendant. *Ib.*

3. *Held*, that the agreement between the parties extended all the covenants of the original lease not specifically changed. *Ib.*

4. If a tenant has occupied such a building under a parol lease for many years, paying an annual rent, he is entitled to a notice to quit of six months, looking to the end of the year. *Blanchard v. Bowers*, 403.

5. Assumpsit for use and occupation will not lie unless the relation of landlord and tenant exists between the parties. *Blake v. Preston*, 613.

6. *Held*, that this relation did not exist upon the facts found. *Ib.*

See NEGLIGENCE 4.

LAND DAMAGES. *See* HIGHWAYS AND BRIDGES 6.

LANE. *See* HIGHWAYS AND BRIDGES 2, 3.

LATERAL SUPPORT.

1. A land owner is entitled to the lateral support of his soil in its natural condition, but not as to any artificial structure placed upon it. *Graves v. Mattison*, 630.

2. Therefore an injunction will not be granted to restrain a land owner from erecting the foundations of his building upon such a level that the adjoining owner cannot rebuild his foundations without removing the lateral support of the first. *Ib.*

LEASE.

1. Plaintiff leased defendant certain premises for a given term for a stipulated rent, payable monthly. The lease contained a proviso that the defendant might, at the expiration of the term, having kept all the conditions of the lease, purchase the premises if he so elected. *Held*, that if the plaintiff had received all the rent he could not refuse to convey, because it had not always been paid when due. *Mack v. Dailey*, 90.

2. The language of the lease was that the defendant might purchase at "the option of the parties." *Held*, that this meant at the option of the defendant. *Ib.*

See REAL ESTATE; LANDLORD AND TENANT 4, 5, 6.

LEGACY. *See* WILL 8, 9, 10.

LEGISLATIVE POWERS.

1. The legislature may prevent the introduction and spread of contagious diseases, and the necessity and propriety of particular regulations to that end are primarily a question for legislative determination; but whether such regulations are reasonable, impartial, and consistent with the state policy is a question for the court. *State v. Speyer*, 502.

2. A regulation by the State Board of Health under legislative authority, applicable to the whole state without reference to location or condition, that no one shall maintain a pigpen within one hundred feet of a well or spring of water used for drinking purposes, or within one hundred feet of any street or inhabited house, is unreasonable and void. *Ib.*

LICENSE. *See* TELEGRAPH LINE 1, 2, 3.

LIEN.

If the owner of personal property sells and subsequently repurchases it, a vendor's lien reserved upon such re-sale will be valid, although as against creditors there has been no sufficient change

of possession, for the reserving and recording of the lien takes the place of possession. *Ward et al. v. Camp*, 461.

See CONDITIONAL SALE 1, 2, 3; EQUITY 15.

LIMITATIONS OF ACTIONS.

1. A replication to the statute of limitations setting forth that a previous suit was seasonably begun, but that the writ in such suit was not duly served, should allege that such failure of service was due to unavoidable accident or to the fault or neglect of the officer serving the same. *Scott v. School Dist.*, 150.

2. Nor is it enough to allege that the former suit was abated for defective service and the present suit brought within a year from such abatement. It must further appear that the cause of the defective service was within the statute. *Ib.*

3. To avoid the statute of limitations upon the ground that the defendant, while residing without the state, had no known attachable property within the state, the plaintiff must affirmatively show that fact. *Batchelder v. Barber*, 254.

LOW WATER MARK. See WATERS 3.

MACHINERY. See FIXTURES 1, 2, 3.

MARRIED WOMAN. See INSOLVENCY 1, 4; HUSBAND AND WIFE 1.

MASTER AND SERVANT.

1. *Held*, that the use of the phrase "risks that are due to the master" was not, in view of the context of the charge, error as being too indefinite. *Eastman v. Curtis et al.*, 432.

2. The plaintiff was injured by the falling of the defendant's elevator. The jury was told that "the plaintiff, being the employee, was not bound to inspect the elevator, but had a right to rely on the defendant having put in a proper elevator for his use." *Held*, correct as applied to the facts in this case. *Ib.*

3. *Held*, that the evidence of the plaintiff tended to show negligence in the defendant. *Ib.*

MERGER.

The merger of the different titles in a common owner between the mortgage of 1841 and those of 1865 did not, as matter of law,

abrogate the by-laws under which the different privileges had been used. *White & Hammond v. Amsden*, 1.

MISDEMEANOR. See CRIMES AND OFFENCES 1.

MORTGAGE.

1. If a mortgagor conveys the mortgaged premises upon condition that the grantee shall assume and pay the mortgage, and the grantee subsequently conveys a part of the same premises, which the mortgagee releases upon receiving the proceeds and applying them upon the mortgage, the mortgagor is not thereby discharged from the balance of the mortgage debt. *Norton, Admr., v. Henry*, 307.

2. A mortgagee in possession, who buys in the equity of redemption, is liable for rents upon redemption by a subsequent mortgagee. *Clarke v. Paquette*, 681.

3. If the owner of two mortgages forecloses them both in one petition and occupies the premises under the decree obtained, he is liable for rents as to one having an interest between his two mortgages and not made a party to his foreclosure proceedings. *Id.*

4. And the right to the application of rents is the same although the interest is only a right of way across the premises. *Id.*

5. If the maker of a note secured by real estate mortgage gives a chattel mortgage to secure the payment of the interest, he thereby separates the interest from the principal, and the holder of the real estate mortgage may take a decree for the amount of the principal without interest. *Olcott v. Davis*, 685.

6. Such a decree gave the petitioner interest on the amount of the decree from its date, and upon default the petitioner took possession of the mortgaged premises. *Held*, that the real estate should be applied to the payment of the principal first, and that the mortgagor must show that the value of the premises was sufficient to pay both principal and interest at the time of default, or the mortgagee could recover the interest under his chattel mortgage. *Id.*

See FIXTURES 1, 2, 3.

MOTION TO DISMISS. See REPLEVIN 3; TRIAL 9; APPEAL 3, 4, 5.

MULTIFARIOUSNESS. *See* EQUITY 10.

NEGLIGENCE.

1. One who attempts to pass between freight cars by climbing over the buffers is guilty, as a matter of law, of contributory negligence, although the cars have been unnecessarily left standing across a public highway for a long time, and although no engine is attached or in sight. *Magoon v. Boston & Maine Rd. Co.*, 177.

2. *Held*, that there was no evidence tending to show that the servants of the defendant in charge of the train knew or ought to have known the perilous position of the plaintiff in time to have prevented the injury. *Ib.*

3. That the defendant failed to blow the whistle, or ring the bell, or give some other warning of its intention to move the cars, did not excuse the plaintiff from due diligence on his own part. *Ib.*

4. It is not negligence upon the part of the occupant of a room in which is a set-bowl to leave the faucet into the bowl open, the bowl being provided with a waste pipe which was of sufficient size to, and did in fact at the time, carry the water off from the premises, and the occupant being under no obligation to repair the plumbing beyond his premises, and having no reason to believe that it was defective. *Lane v. Scagle*, 281.

See EVIDENCE 42; SLAUGHTER-HOUSE 1, 2; PENAL STATUTE 2; MASTER AND SERVANT 1, 2, 3; CONTRIBUTORY NEGLIGENCE 1.

NEW COUNTS. *See* APPEAL 2.

NEW TRIAL. *See* TRIAL 8.

NON-USER. *See* EASEMENTS AND SERVITUDES 2, 3.

NOTES AND BILLS.

1. The defendant bought a mowing machine upon condition that he need not pay for it if it did not work well. Subsequently he gave his note payable in one year, upon the understanding that he could within the year ascertain whether the machine was satisfactory. *Held*, that having made no complaint until after the maturity of the note he could not then, under the circumstances

of this case, make the defence that the machine did not work well. *Hastings v. Adams*, 119.

2. The plaintiff claimed title through a chattel mortgage. The defendant insisted that the mortgage was void because the note secured was described as an absolute indebtedness, whereas, in fact, it was collateral for the payment of another note upon which the plaintiff was surety for the mortgagor. *Held*, that the evidence tended to show that the latter note was the debt of the plaintiff, although he signed the same as surety. *Sherman v. Estey Organ Co.*, 550.

See FRAUD 1, 2, 3, 4; PAYMENT 1.

NOTICE TO PRODUCE. See EVIDENCE 36.

NOTICE TO QUIT. See LANDLORD AND TENANT 4.

OFFICER DE FACTO. See SCHOOLS 11.

OUTLAWED NOTE. See EVIDENCE 4.

PARTIES.

The plaintiff's intestate took under her husband's will a life interest in and absolute title to all his property, subject to the payment of a small legacy out of what might remain at her death. *Held*, that the plaintiff, as her administrator, could recover from the defendant money which he had received as her agent during her life time. *Crampton v. Seymours*, 393.

See HUSBAND AND WIFE 4, 5; TELEGRAPH LINE 3; EQUITY 15.

PARTITION OF LANDS.

1. A part owner of real estate, who redeems it from a tax sale, has a lien upon the entire property for the amount so advanced, and his co-tenants cannot maintain a petition for partition until they have paid him their proportion of the same. *Wilmot v. Lathrop et al.*, 671.

2. Where upon a petition for the partition of real estate the commissioners have, under order of the county court and upon due notice, sold the property, their report should be accepted and distribution of the funds received ordered, notwithstanding that the price was grossly inadequate. *Carver et al. v. Spence*, 563.

PARTNERSHIP.

1. The question being whether certain real estate was to be treated as partnership assets, and so liable for an indebtedness of the defendant to the partnership, the finding of a master to whom is referred the winding up of the partnership is conclusive. *Hubbard v. Moore*, 532.

2. A partner cannot convey partnership property in satisfaction of his individual debt, and one receiving such conveyance holds it subject to the rights of the partnership creditors; nor does he by paying off an incumbrance against such property after receiving the conveyance become a creditor of the partnership. *Ib.*

3. The debts of the co-partnership being nearly as much as the value of the partnership property, a considerable part of which consisted of the real estate in question, a conveyance by the defendant partner of his entire interest in said real estate would be in fraud of the partnership creditors, and would justify a dissolution of the co-partnership and a decree for a sale of such real estate. *Ib.*

PAROL EVIDENCE. See EVIDENCE 3, 17; TRUST 6.

PAUPER.

1. Under No. 55, Acts of 1892, that town in which a pauper has his legal residence, whenever acquired, is liable to a town in which he is transient for his support. *Woodstock v. Barnard*, 97.

2. But no recovery can be had for aid furnished before the giving of the notice required by said act to the overseer of the town sought to be charged. *Ib.*

3. In 1874 the pauper was ordered to remove from the plaintiff to the defendant town. Before he actually removed the defendant took charge of him, and supported him in plaintiff town until 1891. *Held*, that the residence of the pauper from 1874 was in legal effect in defendant town, that he was transient in plaintiff town, and that plaintiff could recover. *Sandgate v. Rupert*, 258.

4. The intestate, while residing in defendant town, contracted with it to support one of its paupers for a given time. Subsequently, and during the life of the contract, he removed the pauper into another town, and continued to support him there against the protest of the defendant. *Held*, that there could be no recov-

ery for support furnished after the time limited by the contract. *Baldwin v. Worcester*, 285.

5. The plaintiff, while residing in defendant town, contracted to support one of defendant's paupers for a year, and entered upon the performance of the contract. Subsequently he removed with the pauper into another town. Defendant notified plaintiff that it would not pay for support after date of removal, and sent an order for the amount due up to date of removal, which plaintiff accepted. Plaintiff continued to support pauper after the expiration of the year, and claimed to recover upon the express contract for the balance of the year, and upon an *implied contract* after. *Held*, that he might recover upon the express contract, for it was the duty of the defendant to take back the pauper if it wished to terminate that contract. That he could not recover upon the implied contract, for it was the duty of the plaintiff to return the pauper at the end of the year. *Newton v. Waterford*, 372.

6. In order to charge a town with the support of a pauper under No. 55, Acts of 1892, it must be shown that the pauper has a residence in the defendant town in his own right. There is no such thing as a derivative residence. *Fairfax v. Westford*, 390.

7. A helpless pauper of full age, who resides in his father's family and is supported by him without aid from any town, is a resident of the town in which the father lives. *So. Burlington v. Worcester*, 411.

8. Where such a pauper has been for many years a member of his father's family, and has no other home and no means of providing one, and the father removes with his family, including the pauper, into another town, the residence of the pauper changes with that of the father, irrespective of any intention which the pauper may or may not have as to the place of his home. *Id.*

9. The pauper was a helpless cripple without means, who for many years had lived in his father's family and been supported by him. Previous to December, 1888, the defendant town had contracted with the father to support the pauper until June, 1889. In December, 1888, the father, against the protest of the defendant, removed with the pauper into the plaintiff town, and continued to reside there, supporting the pauper without further arrangement

with the defendant until his death, November 1, 1890. Thereupon the plaintiff was applied to, and assumed the support of the pauper. *Held*, that the plaintiff could not recover of the defendant for the support thus furnished, no claim being made under No. 55, Acts of 1892. *Ib.*

10. A person helpless in body, but with normal mental faculties, is presumed to become emancipated upon attaining his majority, although he continues to reside in his father's family. *St. Johnsbury v. Waterford*, 641.

11. A three years' residence of this character is sufficient to charge a town with the support of the person as a pauper, although the father actually supported him, provided no aid was furnished by any town. *Ib.*

See WILL 7 ; TOWNS 1, 2.

PAYMENT.

1. When and to what extent a note operates as a payment of an indebtedness. *Robinson v. Leach*, 128.

2. When money is paid to apply upon a note the law applies it whether it is actually endorsed or not. *Farrington v. Jennison*, 569.

3. Where, upon a note payable with interest annually, a payment is made before the interest falls due which is sufficient to pay the interest then due and a portion of the principal, but which is not specifically applied, the maker of the note has the right to have the computation carried forward to the end of the year, and the amount applied in payment of the interest then falling due. *Olcott, Admr., v. Davis*, 685.

See LEASE 1 ; CONSTRUCTION OF CONTRACT 1.

PENAL STATUTE.

1. No action can be maintained in this jurisdiction upon the penal statute of another state. *Adams v. Rd. Co.*, 76.

2. Chap. 112, sec. 212, Pub. St. Mass., providing that if a person is killed by the negligence of a railroad corporation in the operation of its railroad, it shall be liable in damages to the amount of not less than five hundred dollars nor more than five thousand dollars, to be assessed with reference to the culpability

of the corporation, and to be recovered in an action by the administrator or executor of the deceased person for the benefit of the widow and next of kin, is penal. *Ib.*

PENT ROADS. *See* HIGHWAYS AND BRIDGES 2.

PERCOLATING WATER. *See* WATERS 1, 2.

PERJURY.

1. An indictment in accordance with No. 29, Acts of 1890, "An act to simplify indictments for perjury," is sufficient. *State v. Camley*, 322.

2. The testimony of the respondent upon the former trial, in which it is alleged that the perjury was committed, may be read as evidence by the stenographer who took it. *Ib.*

PIG-PEN. *See* LEGISLATIVE POWERS 2.

POLICE REGULATION. *See* LEGISLATIVE POWERS 1, 2.

PLEADING.

1. To support an action on the case, the facts, well pleaded, must show an invasion of a legal right of the plaintiff, with a proper allegation of injury, or the invasion of such a right that the law implies some resulting injury. *Sprague v. Fletcher*, 46.

2. The only manner in which bank stock can be sold in satisfaction of a tax is that pointed out in No. 11, Acts of 1882, and to allege that the defendant, as tax collector, having in his hands a regular warrant for the collection of a tax against the plaintiff, levied upon and sold the plaintiff's stock in satisfaction of said tax, sets forth that the plaintiff was divested of his title to his stock. *Ib.*

3. But to say that the defendant, as tax collector, held a *pretended* tax against the plaintiff is not an allegation that he held such a warrant. *Ib.*

4. It is sufficient in trespass *quare clausum* to describe the premises as part of a certain lot in a given range with a reference to the record of the deed to the plaintiff. *Swerdferger and Wife v. Hopkins*, 136.

5. A plea to the jurisdiction of a court of general jurisdiction must allege not only that the court in question has no jurisdiction, but also that another court has. *Kenney et al. v. Howard*, 375.

6. A plea to the jurisdiction must be signed by the defendant in person, and not by his attorney. *Ib.*

7. A plea setting up a judgment in bar need not allege that such judgment is still in force. *Ib.*

8. A plea to an action brought in the name of executors, setting forth that "long before the beginning of the suit" the matters were adjudicated by commissioners upon the estate, states the date of the judgment with sufficient definiteness. *Ib.*

9. When several statements of facts are connected by the conjunction and, one allegation of time applies to all. *Ib.*

See EQUITY 1; INSURANCE 1, 6, 8, 9; CRIMES AND OFFENSES 4.

POWER OF SALE. See CHATTEL MORTGAGE 6, 7.

PRACTICE.

1. It does not necessarily follow that testimony in the same line with that given by the plaintiff in the opening of his case is not strictly in rebuttal, and where nothing more appears from the record than this, the court will not reverse the judgment upon the ground that such testimony was improperly admitted in rebuttal, although it appears from the exceptions that it was not admitted as matter of discretion.

2. Where an exception is taken to the refusal of the court to charge as requested, and the bill of exceptions refers to the request and charge to show what they were, the question will not be considered in the supreme court unless copies of the request and charge are furnished. *Swerdferger and Wife v. Hopkins*, 136.

3. A judgment upon the direction of a verdict will be reversed if the court during the trial excluded evidence tending to support the cause of action upon the part of the adverse party. *Amsden v. Fitch & Enright*, 522.

4. An exception to the action of the trial court in excluding a letter will not be considered in supreme court, where the letter is not before that court nor its contents stated. *Ballard v. Brown*, 586.

5. In tax proceedings, only those defects insisted upon by the excepting party in the court below, as shown by the record, will be considered in the supreme court. *Wilmot v. Lathrop et al.*, 671.

6. If a respondent relies upon a misnomer to sustain a motion for a verdict, he should point out that ground in the trial court or it will not be considered in the supreme court. *State v. Dyer*, 690.

7. Since a state's attorney, or his successor in office, may amend an information in both form and substance, the supreme court, not being able to agree whether the information was sufficient, remanded it to the county court for further proceedings. *State v. Meacham*, 707.

See APPEAL 2, 3, 4, 5; TRIAL 3, 4, 9, 16, 17, 18, 21; ERROR 7, 8; CHARGE OF COURT 8; EQUITY 11, 12.

PREMATURE SUIT. See COMMENCEMENT OF SUIT 1; EVIDENCE 10.

PRIVILEGE. See SLANDER AND LIBEL 1, 2.

PROBATE COURT.

1. An error of law in a decree of the probate court distributing the estate of a deceased person should be corrected by appeal, and if no appeal is taken the decree establishes the law of that case, and cannot be subsequently altered by the probate court. *Leavins v. Ewins*, 256.

2. Upon an appeal from the disallowance of a claim by the probate court, the county court may allow the filing of a declaration in account in place of a declaration in assumpsit for the same cause of action. *Leonard v. Leonard*, 318.

3. Where the origin of the claimant's title is purely equitable, the probate court has no jurisdiction. *Ib.*

4. The testimony tended to show that the intestate of the defendant held title to a farm, which had been partly paid for by the money of the plaintiff's intestate; that said farm had been sold, and the entire avails paid to defendant's intestate. *Held*, that the probate court had no jurisdiction of the claim of the plaintiff's intestate to a portion of such avails. *Ib.*

5. The allowance of an account of the executors in which they were credited with six thousand dollars set apart for this purpose, would not constitute an adjudication that the daughter was entitled only to the income of that fund. *Boomhower v. Babbitt's Admr.*, 327.

See WILL 3; ACTION; ESTATES OF DECEASED PERSONS, 1, 2, 3, 4; EXECUTORS AND ADMINISTRATORS 4; EQUITY 9, 15.

PROCESS. See REPLEVIN 2.

PROMISSORY NOTE. See NOTES AND BILLS 2.

PROOF OF LOSS. See EVIDENCE 37.

PRESUMPTION. See EVIDENCE 19.

PRUDENTIAL COMMITTEE. See SCHOOLS 6, 7.

PUBLIC HEALTH. See LEGISLATIVE POWERS 1, 2.

PURSE OR STAKE. See WAGER 1.

QUADRENNIAL APPRAISAL. See GRAND LIST.

QUARE CLAUSUM. See PLEADING 4.

REAL ESTATE.

A building erected upon the land of another under arrangement with the owner of the land that it shall be removed when required, is real estate. *Blanchard v. Bowers*, 403.

RAILROAD COMPANIES.

In an action against a railroad company for not maintaining a sufficient cattle guard, whereby the plaintiff's horse passed from the highway onto the track and was injured, it is no defence that the horse escaped from the control of the owner, who was lawfully leading it along the highway, through his neglect. *Harwood's Admx. v. Ben. & Rutland Ry. Co.*, 664.

See NEGLIGENCE 1, 2, 3.

RAPE.

1. The respondent in a prosecution for rape may inquire of the prosecutrix upon cross examination, whether she had intercourse with a certain person at about the time of the alleged offence. *State v. Hollenbeck*, 34.

2. He may also show upon such cross examination that the relations between himself and the prosecutrix were friendly and cordial before the alleged offence and continued equally so afterwards. *Ib.*

RATIFICATION. See SCHOOLS 7.

REBUTTAL. See TRIAL 5.

RECEIVER. See EQUITY 13, 14.

RENTS AND PROFITS. See MORTGAGE 2, 3, 4.

REPLEVIN.

1. A mortgagee, to maintain replevin for property to which he holds title by chattel mortgage against an officer who has taken the same in execution against the mortgagor, must show that such officer has unlawfully taken or detained the property; that is, that he holds it in a way inconsistent with the statutes permitting the attachment and sale of the mortgagor's interest. It is not enough that he has levied upon and advertised it for sale. *Bank v. Miller et al.*, 66.

2. A writ in replevin must be made returnable in the county where the goods are detained at the time the suit is begun; and if they are afterwards removed into another county, it may be served there. *Crosier v. Stillson*, 315.

3. Upon a motion to dismiss, the statement in the declaration of the place where the property is detained controls as against the return of the officer that he served the writ in another county. *Ib.*

REQUEST TO CHARGE. See EXCEPTIONS 3.

RESIDENCE. See PAUPER 7, 8, 9, 11.

RE-SURVEY. See HIGHWAYS AND BRIDGES 4.

RIGHT TO BEGIN. See TRIAL 15.

RIGHT OF WAY. See MORTGAGE 4.

SALE. See LIEN.

See INSOLVENCY 8.

SCHOOLS.

1. A school district is a political division created by the state to carry out its policy to educate its youth, and holds any funds coming to it for that purpose as a trustee. *Town of Barre v. School District*, 108.

2. The state may change the territorial limits of school districts at will, and such change simply amounts to a change of trustees. *Ib.*

3. So when the legislature by Nos. 20 and 21, Acts of 1892, abolished existing school districts, and made each town a district

charged with the education of its youth, the town became entitled to the funds held by the districts for general educational purposes, and to any taxes assessed, but not collected. *Ib.*

4. The collection of uncollected taxes would be a settlement of its pecuniary affairs for which the existence of the district is continued by said acts. *Ib.*

5. It is no excuse for a defective school district warning that similar warnings had been used for many years. *Scott v. School Dist.*, 150.

6. The prudential committee of a school district cannot employ himself as a teacher, and cannot recover from the district upon a *quantum meruit* for services so rendered. *Ib.*

7. But if he actually teaches the school, and regularly keeps and returns to the town clerk his school register, and upon the strength of it the district receives and applies its portion of the public money, that will amount to a ratification of his contract and he may recover. *Ib.*

8. Wood on hand for use in a school district at the time of the passage of No. 20, Acts of 1892, abolishing school districts became the property of the town for school purposes. *School Dist. v. Pierce*, 317.

9. In 1847 plaintiff's farm, which was situate in the town of Royalton, was by the concurrent votes of the town set from District No. 4 in Royalton to District No. 16 in Tunbridge. In March, 1893, by the concurrent votes of the two districts agreeably to No. 158, Acts of 1892, District No. 4 became a part of South Royalton Graded School District. April 1, 1893, by No. 20, Acts of 1892, each town was constituted a school district, and existing districts, excepting graded school districts, were abolished. *Held*, that thereafter plaintiff's farm belonged to Royalton, and not to the South Royalton Graded School District. *Dodge v. School Dist.*, 334.

10. The warning for an annual school meeting must specify the business to be transacted, although fixed by statute, and the election of a treasurer at such meeting without an article in the warning therefor is void. *School Dist. v. Smith*, 569.

11. So long as an officer *de jure* is in possession of the office there can be no such thing as an officer *de facto*. *Ib.*

12. A school district cannot maintain an action against its legally acting treasurer for its funds in his hands. *Ib.*

See WILL 6.

SCHOOL DISTRICT. *See* SCHOOLS 1, 2, 3, 4, 8, 9.

SET-OFF.

1. In an action against two, the individual claim of one defendant against the plaintiff cannot be pleaded in off-set. *Johnson v. Kelley et al.*, 386.

2. But, the action being upon a note given for the purchase price of an article sold by the plaintiff to one of the defendants, a breach of warranty in the sale may be shown in defence. *Ib.*

SETTLEMENT. *See* CROSS-EXAMINATION 2.

SECOND OFFENCE. *See* INTOXICATING LIQUOR 2.

SELECTMEN. *See* TAXES 11.

SLANDER AND LIBEL.

1. Words spoken in a judicial proceeding are privileged only so far as they are material to the matter in controversy. *Clemmons v. Danforth*, 617.

2. The plaintiff, a physician, presented a claim against the estate of a deceased person. The defendant, being interested in the estate, appeared before the commissioners to resist the allowance of the same, and there said, among other things, in reference to the plaintiff: "This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a ~~visit~~ ^{visit}, and I paid it and I can prove it." *Held*, not material and therefore not privileged. *Ib.*

SLAUGHTER HOUSES.

1. A statute which is not manifestly repugnant to a former law will not be held to repeal it, unless it revises the whole subject-matter of the former law, and is evidently intended as a substitute for it. *State v. Woodbury*, 602.

2. R. L., s. 3923, providing that the butchering business shall not be carried on without the written approval of the board of civil authority, and No. 82, Acts of 1892, empowering local boards of health to remove sources of filth, have not superseded the

common law remedy by indictment for nuisance in the maintaining of a slaughter house. *Id.*

3. In order that a slaughter house may become an indictable nuisance it is not necessary that the odors therefrom should endanger the public health, if they are seriously offensive to passers-by. *Id.*

SPECIFICATIONS. *See* APPEAL 16.

STATE BOARD OF HEALTH. *See* LEGISLATIVE POWERS 1, 2.

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STENOGRAPHIC TRANSCRIPT. *See* EXCEPTIONS 1.

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SUBROGATION. *See* CHATTEL MORTGAGE 8.

SUPPORT. *See* DEED 3; EJECTMENT 2, 3; EVIDENCE 10, 11, 12, 13, 14, 15.

SURETY. *See* EQUITY 5; MORTGAGE 1.

TAXES.

1. The charter of the village of Montpelier provided that the bailiffs might at any time before the voting of a tax make a grand list upon the basis that the town grand list comprised within the limits of the village should constitute such grand list, and that the bailiffs should deduct therefrom the real estate lying without the limits of the village, and further that the bailiffs should make out and deliver to the collector a rate bill for the collection of any tax duly voted. The bailiffs assessed the tax in question upon property and persons within the limits of the village upon the basis of the town grand list, and delivered the rate bill to the defendant as collector, who receipted for and proceeded under the same. *Held*, that in a suit upon the collector's bond for not collecting and paying over the tax, the objection that no separate grand list for the village was prepared before the voting of the tax could not be urged. *Montpelier v. Clarke et al.*, 479.

2. In a suit against a collector for not paying over taxes

actually collected, it is no defence that the grand list was invalid. *Ib.*

3. A tax collector and his sureties are liable in an action upon his bond, conditioned for the faithful performance of his duties, for uncollected taxes, unless some valid excuse is shown for their non-collection. *Ib.*

4. In a suit upon a tax collector's bond for not collecting and paying over the taxes for a particular year, it is not a defence that he did pay over the money collected on that bill to apply on previous bills, and therefore no error to reject evidence of that fact. *Ib.*

5. The true date when the listers were sworn and deposited the quadrennial appraisal in the town clerk's office may be shown by parol, although there is attached to the appraisal, as deposited, a certificate that the oath was administered on a day later than that within which the list should have been completed and filed. *Wilmot v. Lathrop et al.*, 671.

6. *Quere*, whether this would be so if the tax-payer, relying upon the date attached to the appraisal, had lost the right of appeal. *Ib.*

7. No record of the preliminary oath of the listers need be made by the town clerk. *Ib.*

8. Real estate, conveyed by deed by the terms of which the grantor reserves the use and possession, is properly set in the grand list to the grantor as the owner thereof. *Ib.*

9. A mere error in computation will not invalidate a grand list nor a particular tax. *Ib.*

10. *Held*, that it sufficiently appeared from the town records that the tax had been voted under the proper article in the warning. *Ib.*

11. A tax bill delivered to the treasurer in accordance with s. 1, No. 90, Acts 1880, need not be certified by the selectmen, and what it is may be shown by parol. *Ib.*

See SCHOOLS 1, 2, 3, 4; COLLECTOR OF TAXES; GRAND LIST; PLEADING 2, 3.

TAX COLLECTOR. *See* COLLECTOR OF TAXES.

TAX SALE.

A part owner of real estate, who redeems it from a tax sale, has a lien upon the entire property for the amount so advanced,

and his co-tenants cannot maintain a petition for partition until they have paid him their proportion of the same. *Wilmot v. Lathrop et al.*, 671.

TELEGRAPH LINE.

1. An abutter who has consented to the erection of a line of telegraph poles along the street in front of his premises, cannot revoke that license after the poles have been set, but before the wires have been strung. *Western Union Tel. Co. v. Bullard*, 272.

2. By consenting to the erection of the line, the land owner waived any claim he might have for damages, and it is therefore immaterial whether the construction of a telegraph line along a public highway imposes an additional burden, and, if so, whether one who does not own the fee of the street can claim compensation. *Ib.*

3. Persons having a reversionary interest in the premises are not necessary parties, for consent of the defendant did not give an easement, but a mere license. *Ib.*

TORT. See JUDGMENT 2.

TOWNS.

1. The officers of a town cannot bind it for the expense of carrying on a suit in the event of which it has no direct interest. *Sheldon & Cushman v. Bennington*, 580.

2. A town has no such interest in a suit for divorce between husband and wife where the wife has lived for the last nine years with a daughter in Massachusetts and is still so living, although as a result of the suit the wife may become chargeable to the town as a pauper. *Ib.*

See WILLS 4, 5, 6, 7.

TRESPASS.

A plea to an action for trespass by cattle which alleges that the animals escaped into the plaintiff's close through a gate in the division fence between the plaintiff and the defendant, which was sufficient to stop cattle, and which the plaintiff had for many years maintained for that purpose, but which upon the occasion in question he had torn down, and through which the cattle had thereby

escaped into the plaintiff's close, is good, although it does not show that the plaintiff was under any legal obligation to maintain the gate. *Carpenter v. Cook*, 102.

TRIAL.

1. A defendant waives his motion for a verdict made at the close of the plaintiff's case by putting in testimony upon his own part, and if at the close of his own testimony he renews his motion for a verdict, but puts the same upon a different ground, only that ground upon which he places his second motion will be considered in the supreme court. *Swerdferger and wife v. Hopkins*, 136.

2. The defendant town, having in contemplation the construction of a bridge, contracted with the plaintiff to take rubble from his ledge at a certain price. The town did not construct the bridge, but subsequently contracted it, and the contractors took stone from the plaintiff's ledge and settled with him for the same in part. *Held*, that a verdict was properly directed for the defendant, for, under the circumstances of the case, the plaintiff was bound to know that the contractors in taking the stone were acting for themselves, and not as the agents of the town. *Ladd v. Grand Isle*, 172.

3. If counsel transcends the right of argument it is the duty of the trial court to stop him; and if it omits to do so, that is tantamount to a ruling that the remarks are warranted, to which an exception will lie, without in terms asking and obtaining such ruling. *Magoon v. B. & M. R. Co.*, 177.

4. *Held*, that the judgment should be reversed upon the exception taken to the argument of plaintiff's counsel. *Ib.*

5. The defendant having introduced evidence of an agreement between the plaintiff and his sister upon the one part, and the plaintiff's father upon the other, to pay the note of the father to the defendant, the testimony of the sister that no such agreement was made is strictly in rebuttal. *Benedict v. Lawrence*, 219.

6. There must be an exception to the admission of evidence in order to raise the question in supreme court; a mere objection is not enough. *State v. Sawyer*, 239.

7. The plaintiffs contracted to furnish a monument of a certain design and of given dimensions. It was conceded that the dimensions of the monument built were different from those called for

by the contract. *Held*, that the court should have ruled as matter of law that the plaintiffs were not entitled to recover, and that it was error to submit to the jury whether the dimensions used were necessary to give due proportion to the specified design. *Cutler & Burnham v. Dix*, 347.

8. A motion for a new trial is addressed to the discretion of the trial court, and the supreme court cannot revise the exercise of that discretion unless some question of law is reserved. *State v. Perrigo*, 406.

9. A party should state the precise grounds on which he bases his motion for a verdict, and if he does not, the trial court may well disregard it. *Bickford v. Trav. Ins. Co.*, 418.

10. The extent of the cross-examination upon a given subject is largely in the discretion of the trial court. *Held*, no error to refuse to permit further cross-examination in this case. *State v. Plant*, 454.

11. For the purpose of showing that the words "Rock Island Whip Co." referred to a former company, and not to the one in which the orator and defendant, St. Pierre, were partners, the orator testified that the lawyer who drew the articles had said in the presence of himself and St. Pierre that the words had that meaning. Thereupon St. Pierre was inquired of whether he ever heard such a suggestion, and the answer was taken subject to the orator's exception, that the question was leading and incompetent. *Held*, no error, for, so far as the witness was called to contradict the orator, he might be inquired of leadingly, and as to the further scope of the answer, the orator was not harmed. *Norton v. Parsons et al.*, 526.

12. A witness may be asked whether he heard certain words or "that in substance," for this refers to the substance of the words and not their meaning. *Ib.*

13. When the objection to a question is such that it can be obviated, correct practice requires that the ground of the objection should be stated. *Ib.*

14. *Held*, that the orator's right of cross-examination was not abridged in case of a witness who had answered that he could not tell, before the master ruled that he need not answer. *Norton v. Parsons et al.*, 526.

15. If in an action upon a promissory note the defendant pleads the general issue, the plaintiff has the right to begin and close, although the execution of the note is not contested upon the trial. *Farrington v. Jennison*, 569.

16. It is within the discretion of the trial court to permit the plaintiff to bring out, upon the cross-examination of the defendant's witness, matters which, in the then state of the case, could be properly shown in rebuttal. *Ranney, Admr., v. Rd. Co.*, 594.

17. If a question asked upon re-examination is not in explanation or avoidance of anything brought out in cross-examination, the trial court may in its discretion exclude it. *Ib.*

18. Where a motion is addressed to the discretion of the county court, it is reversible error to overrule it *pro forma*, for the party making it is entitled to have the court exercise its discretion. So held of a motion to set aside a verdict for that the damages were excessive. *Ib.*

19. *Held*, that the hypothetical question put to the expert for the state was proper, although it did not refer to all the evidence as to the results from the condition of things shown. *State v. Woodbury*, 602.

20. When two respondents are jointly tried, whatever is admissible against one may be received upon the trial of both under proper restrictions. *State v. Cram*, 650.

21. The respondent and one Bow were jointly tried for murder. Upon the trial the state offered in evidence the declarations of Bow. The respondent excepted upon the ground that they were not admissible as against him. *Held*, that he could not in supreme court raise the question whether they were admissible as against Bow. *Ib.*

22. Upon the joint trial of several respondents, the admissions of one may be received under proper instructions to the jury that they are evidence against him alone. *State v. Dyer*, 690.

See AMENDMENT 1, 2; ERROR 5, 9, 10; CONFESSION 2, 3; CHARGE OF COURT, 4; COUNTY COURT, 2: AGENT 1, 2.

TROTting. See WAGER.

TRUST.

1. A concession that a grantee in a deed of real estate and per-

charged with the education of its youth, the town became entitled to the funds held by the districts for general educational purposes, and to any taxes assessed, but not collected. *Ib.*

4. The collection of uncollected taxes would be a settlement of its pecuniary affairs for which the existence of the district is continued by said acts. *Ib.*

5. It is no excuse for a defective school district warning that similar warnings had been used for many years. *Scott v. School Dist.*, 150.

6. The prudential committee of a school district cannot employ himself as a teacher, and cannot recover from the district upon a *quantum meruit* for services so rendered. *Ib.*

7. But if he actually teaches the school, and regularly keeps and returns to the town clerk his school register, and upon the strength of it the district receives and applies its portion of the public money, that will amount to a ratification of his contract and he may recover. *Ib.*

8. Wood on hand for use in a school district at the time of the passage of No. 20, Acts of 1892, abolishing school districts became the property of the town for school purposes. *School Dist. v. Pierce*, 317.

9. In 1847 plaintiff's farm, which was situate in the town of Royalton, was by the concurrent votes of the town set from District No. 4 in Royalton to District No. 16 in Tunbridge. In March, 1893, by the concurrent votes of the two districts agreeably to No. 158, Acts of 1892, District No. 4 became a part of South Royalton Graded School District. April 1, 1893, by No. 20, Acts of 1892, each town was constituted a school district, and existing districts, excepting graded school districts, were abolished. *Held*, that thereafter plaintiff's farm belonged to Royalton, and not to the South Royalton Graded School District. *Dodge v. School Dist.*, 334.

10. The warning for an annual school meeting must specify the business to be transacted, although fixed by statute, and the election of a treasurer at such meeting without an article in the warning therefor is void. *School Dist. v. Smith*, 569.

11. So long as an officer *de jure* is in possession of the office there can be no such thing as an officer *de facto*. *Ib.*

12. A school district cannot maintain an action against its legally acting treasurer for its funds in his hands. *Ib.*

See WILL 6.

SCHOOL DISTRICT. *See* SCHOOLS 1, 2, 3, 4, 8, 9.

SET-OFF.

1. In an action against two, the individual claim of one defendant against the plaintiff cannot be pleaded in off-set. *Johnson v. Kelley et al.*, 386.

2. But, the action being upon a note given for the purchase price of an article sold by the plaintiff to one of the defendants, a breach of warranty in the sale may be shown in defence. *Ib.*

SETTLEMENT. *See* CROSS-EXAMINATION 2.

SECOND OFFENCE. *See* INTOXICATING LIQUOR 2.

SELECTMEN. *See* TAXES 11.

SLANDER AND LIBEL.

1. Words spoken in a judicial proceeding are privileged only so far as they are material to the matter in controversy. *Clemmons v. Danforth*, 617.

2. The plaintiff, a physician, presented a claim against the estate of a deceased person. The defendant, being interested in the estate, appeared before the commissioners to resist the allowance of the same, and there said, among other things, in reference to the plaintiff: "This isn't the first time he has made up an account, either. He made up one against me of between forty and fifty dollars for which he hadn't made a visit, and I paid it and I can prove it." *Held*, not material and therefore not privileged. *Ib.*

SLAUGHTER HOUSES.

1. A statute which is not manifestly repugnant to a former law will not be held to repeal it, unless it revises the whole subject-matter of the former law, and is evidently intended as a substitute for it. *State v. Woodbury*, 602.

2. R. L., s. 3923, providing that the butchering business shall not be carried on without the written approval of the board of civil authority, and No. 82, Acts of 1892, empowering local boards of health to remove sources of filth, have not superseded the

a right to have the water percolate in its natural state as against a subsequent grantee of a portion of the lot upon which the wells were situated. *Ib.*

3. By "low water mark," as applied to the boundary of lands bordering on Lake Champlain, is meant *ordinary* low water mark. *McBurney v. Young*, 574.

4. The fact that a water power has never been utilized does not prevent the riparian owner from recovering compensation for damages to the same when the water is taken for municipal purposes. *Baxter v. Rutland*, 607.

5. The owner of a farm adjacent to a village may recover as damages for the taking of the water of a brook running through the same not merely what it is worth for farm purposes, but also in view of the fact that the land is available for building lots and the water for supplying buildings which may be erected thereon. *Bridgeman et al v. Hardwick*, 653.

WATER POWER. See DEEDS, 2; MERGER, 1; EQUITY, 1, 2.

WILL.

The plaintiff's husband by will, in which she was named executrix, bequeathed her all his personal property, made his debts a charge upon his real estate, and devised such real estate, subject to the payment of his debts and expenses, to the plaintiff and his daughter equally, provided that if the daughter should die before reaching the age of eighteen, the plaintiff should take the whole. The will gave the plaintiff full control of this real estate until the daughter became eighteen, and further provided that the plaintiff might, at her election, convert it into money, pay off a small incumbrance which rested upon it, and divide the balance between herself and daughter. The plaintiff elected to sell, and paid over to the defendant, as guardian for the daughter, one-half the balance. Subsequently, and before becoming eighteen, the daughter died. The question being whether the plaintiff was entitled to the daughter's share, *held*,

1. The sale of the real estate did not affect the rights of the parties, for upon a fair construction of the will, the plaintiff held the proceeds after the sale in exactly the same way that she did the land before. *Semmig v. Merrihew*, 38.

2. The plaintiff did not lose her claim by paying over the money, for while the payment was a voluntary one and made with full knowledge of the terms of the will, she did not know that the daughter would die before reaching eighteen, and that she would therefore have an interest in her share, and she cannot be said to have waived a right of the existence of which she did not know. *Ib.*

3. The plaintiff lost nothing by the decree of the probate court, settling her account as executrix, in which she was credited with the payment of the daughter's share to the defendant, nor did the defendant gain anything by filing in that court his guardian account subsequently to the death of his ward, it not appearing that the court had taken any action thereon. *Ib.*

4. Inasmuch as a town has power to raise money to keep in repair burial grounds, it may receive a bequest, the annual income of which is to be applied to beautifying and fencing a particular cemetery, upon condition that it will agree to keep good the principal fund through all time.⁴ *Sheldon v. Stockbridge*, 299.

5. By voting to accept the bequest, the town would become bound to fulfill the condition. *Ib.*

6. A bequest to a town, made previous to the passage of No. 20, Acts 1892, of a given sum, the income to be divided among the school districts in proportion to the number of scholars attending school, was not rendered void by the passage of that act abolishing school districts and constituting each town a single district. *Ib.*

7. A bequest to a town "the income only to be used for the relief of the poor in said town." is not void for uncertainty. *Sheldon v. Stockbridge*, 299.

8. The testator bequeathed his daughter an "annuity and sum yearly" of three hundred and sixty dollars, and directed his executors to set apart six thousand dollars and keep the same invested in real estate securities, the income thereof to be used in the payment of this legacy. *Held*, that under the provisions of the will the daughter was entitled to the payment of the three hundred and sixty dollars, irrespective of what income the fund so set apart might yield. *Boomhower v. Babbitt's Admr.*, 327.

9. The allowance of an account of the executors in which they were credited with six thousand dollars set apart for this purpose,

would not constitute an adjudication that the daughter was entitled only to the income of that fund. *Ib.*

10. Under the terms of the will the legacy would be payable at the end of one full year from the death of the testator, and so from year to year thereafter. *Ib.*

11. While it must appear, in order to avoid a will upon that ground, that the undue influence operated upon the very act of making the will, that fact need not be established by direct testimony, but may be inferred from circumstances, although opportunity alone upon the part of the person to be benefitted is not enough. *Smith's Exrs. v. Smith*, 443.

12. *Held*, that the circumstances in this case tended to show undue influence. *Ib.*

WRITTEN CONTRACT. *See EVIDENCE 10.*

WITNESS.

1. The wife is a competent witness in a suit to establish her claim against the insolvent estate of her husband. *Purdy v. Estate of Purdy*, 50.

2. If a mortgage is executed to two mortgagees jointly, although to secure their separate debts, the contract is between them jointly on the one part and the mortgagor upon the other, and the death of one mortgagee will not render the mortgagor incompetent as a witness. *Paddock et al. v. Potter et al.*, 360.

3. The question being whether certain payments were made upon the note in suit to the original payee in his lifetime, the defendant cannot testify to conversations with the plaintiff touching such payments, although the plaintiff has been produced as a witness thereto. *Farrington v. Jennison*, 569.

4. The plaintiff was properly allowed to put in evidence an outlawed note, not in suit, from the defendant to the same payee with payments indorsed upon it, as tending to refute the claim of the defendant as to some of the payments upon the note in suit. *Ib.*

See HUSBAND AND WIFE 5, 6.

E. L. B.

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